Federal Court  Cour fédérale

Date: 20220624

Docket: IMM-5270-20

Citation: 2022 FC 953

Ottawa, Ontario, June 24, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

CONSTANCIA DELA CRUZ IGNACIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for leave and judicial review of a decision of a Senior Immigration Officer dated October 6, 2020, which was a reconsideration of a previous humanitarian and compassionate ("H&C") grounds application decision. The Officer refused this application.

II. Background

[2] The Applicant is a citizen of the Philippines who arrived in Canada on February 27, 2006 to work as a live-in caregiver. She has five children, all of whom reside in the Philippines. She raised all of her children alone, and once she began working abroad to provide for her family, the Applicant's mother cared for the children. The Applicant's children all share a one bedroom apartment in the Philippines, financially supported by their mother, and none of them are financially independent.

[3] The Applicant applied for, but was unable to meet, the permanent residency requirements under the live-in caregiver program. Her last work permit expired in 2014, and she has been working without authorization since. In November 2017, the Applicant made an application for permanent residence on H&C grounds. She also applied for a Temporary Resident Permit ("TRP") and work permit, both which were refused in April 2019.

[4] The Applicant's November 2017 H&C application was refused. She sought judicial review, which was consented to by the parties and the matter was sent back for reconsideration by a different officer. On October 6, 2020, this H&C application was refused again. That decision is the subject of this judicial review.

III. Issue

[5] The issue is whether the Immigration Officer's decision to deny the Applicant's H&C was reasonable.

IV. Standard of Review

[6] The applicable standard of review is reasonableness. As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 23, “where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.” I see no reason in this case to deviate from this general presumption. As such, the standard of review in this case is reasonableness.

[7] In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Vavilov* at para 13). When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99). A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting “an internally coherent and rational chain of analysis” when read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

V. Analysis

A. *H&C Framework*

[8] Subsection 25(1) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [*IRPA*] gives the Minister discretion to exempt foreign nationals from the ordinary requirements of the *IRPA* and grant permanent resident status, if the Minister is of the opinion that such relief is justified for H&C reasons. The discretion in subsection 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA*, to mitigate the rigidity of the law where the facts warrant special relief (*Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 19 [*Kanthasamy*]). The Applicant must justify the exemption requested. The purpose 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).

[9] In order to make its determination, an officer must substantively consider and weigh all the relevant facts and factors before them and must conduct an assessment of the Applicant's hardship (*Kanthasamy* at paras 22, 25). Subsection 25(1) presupposes that an applicant has failed to comply with one or more provisions of the *IRPA*. As such, a decision-maker must assess the nature of the non-compliance and its relevance and weigh this against the H&C factors in each case when conducting its analysis (*Mitchell v Canada (Citizenship and Immigration),* 2019 FC 190 at para 23).

B. *Analysis*

[10] In coming to their decision, the Immigration Office considered four factors: establishment, best interests of the children ("BIOC"), hardship upon return, and the Applicant's immigration history. The Officer weighed these several pieces of evidence, concluded that three of them (establishment, BIOC and hardship) were in the Applicant's favour, and that one was not (immigration history). In considering this judicial review, I envision a teeter-totter (see–saw), with these varying factors weighing on both sides. Yet, I am of the view that both sides of the teeter-totter are encumbered by errors in the Officer's analysis, and thus the conclusion is itself unreasonable.

(1) Establishment

[11] I turn first to the issue of establishment. The Applicant argues that the Officer's decision was unreasonable by virtue of stating that they gave "some weight" to the Applicant's establishment while failing to do so, and by holding the impact of her potential removal on her establishment to the standard of "irreparable harm."

[12] In contrast, the Respondent submits that the Officer's decision was reasonable, as the Applicant's establishment "consists of nothing more than the years spent in Canada, her employment, and the friendships she has made," which in their view is not sufficient. The Respondent asserts that the Officer's use of the term irreparable harm was less meaningful than the Applicant argues, since the Officer was not a lawyer and was thus not using it as a legal test.

(2) Best Interests of the Children

[13] The next factor to be considered is the best interests of the children. The Applicant submits that it is in the best interests of the Applicant's five adult children in the Philippines, who are financially dependent on her, as well as the two minor children (her employers' children) she cares for, for her to remain in Canada, and that this was unreasonably considered by the Officer. The Respondent asserts that the adult children need not be considered in the best interests assessment, but that the Officer's treatment of Angelbert's (the youngest of her children) interests was nonetheless reasonable because he was under 18 when the application was made. The Respondent's submissions are that the Officer's decision to give the interests of the two children she cares for some weight was reasonable.

[14] Though the Officer did give BIOC some weight in their analysis, I nonetheless find the Officer's consideration of this factor to have been unreasonable. Specifically, the Officer's treatment of Angelbert and his sibling's interests. The Officer noted that they were financially dependent on the Applicant, and that all five of them share a one-bedroom apartment. The Officer also noted that the Applicant had difficulty providing for them while she was in the Philippines, and that if she were to remain in Canada, she could continue supporting them as she has been.

[15] Yet, the Officer's consideration of their interests deviates from this. The Officer concluded, as part of a nuanced analysis that led to "some [positive] weight" for the Applicant staying in Canada, that if she were returned to the Philippines, she would be able to find a way to

support her family. The Officer wrote that "she has gone to great lengths and is willing and able to provide a loving, secure, and healthy environment for Angelbert and his siblings… [She] has worked abroad for over two decades in order to support Angelbert and his siblings financially and provide them with a better education… [She] will likely to continue to do so to ensure that Angelbert's best interest and needs are met." This is unreasonable. By the Officer's own admission, the Applicant has struggled to provide for her family when she was in the Philippines. It is unreasonable to, simply because she "has gone to great lengths" in the past two decades, conclude that she will now be able to financially support them if she is in the Philippines especially given the devastation COVID has wrought on the Philippines employment stats. Such analysis deviates from the requirement from *Vavilov* that reasons be transparent, intelligible, and justified. This conclusion is not justified in light of the facts and law that constrain the Officer.

(3) Hardship

[16] I turn next to the Officer's assessment of the Applicant's hardship upon her prospective return to the Philippines. The Applicant argues that the Officer erred by dismissing evidence of the generalized country conditions in the Philippines, as well as by minimizing the Applicant's hardship due to her familiarity with the country, her adaptability, and her transferrable skills.

[17] The Respondent disagrees, asserting that this consideration formed part of a reasonable weighing of the submissions and evidence before the Officer.

[18] I agree with the Applicant in part.

[19] On the first point – that the Officer dismissed evidence of the generalized country conditions in the Philippines, and thus erred – I do not agree with the Applicant. The Officer noted in significant detail adverse country conditions in the Philippines, and ultimately afforded them little weight in light of the purpose of H&C applications under section 25 of the *IRPA.* This is in line with the jurisprudence. In *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 at paragraph 19 [*Zhang*], Justice Zinn wrote that "the test under subsection 25(1) and the question to be asked, is this: Understanding that relief from the rigidity of the law is exceptional, do the particular circumstances of the applicant excite in a reasonable person in a civilized community a desire to relieve their misfortunes?"

[20] Indeed, in line with *Zhang* while it would be, in my view, an error for the Officer to require the Applicant to demonstrate exceptional circumstances as a threshold for H&C relief, that is not what has occurred here. Rather, the Officer reasonably considered the Applicant's evidence of personal circumstances as well as the general country conditions and found that they did not justify H&C relief.

[21] However, on the second point, I agree with the Applicant. Despite giving this factor some positive weight, the Officer still unreasonably minimized the Applicant's hardship upon a return to the Philippines. In their decision, the Officer noted that the Applicant's work experience abroad would be useful in her finding work in the Philippines, which mitigated the hardship she would face. In my view, this departs from a rational chain of analysis justified in light of the facts and law. If the Applicant was able to find work that would sustain her and her family in the Philippines, she would have done so, and as stated by the Applicant, not "lost the chance to see

her own children grow." There is no well-reasoned, intelligible explanation in the Officer's reasons that sufficiently explains this discrepancy; the mere fact that she has worked elsewhere for two decades, nor that she is "adaptable, resilient, self-sufficient, and resourceful," are, in my view, insufficient to do so. Viewed through an H&C lens, the Applicant has made significant sacrifices to provide for her family, living abroad and away from them, and absent an explanation as to why this could easily change *and* why she has not done so to this point, the decision is not reasonable.

(4) Immigration History

[22] Finally, I turn to the Applicant's immigration history. The Applicant entered Canada on February 27, 2006, and had temporary status as a foreign worker until March 1, 2014, at which point she failed to leave. She made several applications to regularize her status in Canada in the meantime, each of which was refused, and one such refusal stated that if she did not depart, enforcement action may be taken against her. An approximation of her work is that she had previously worked in Hong Kong starting in 1995 and then went home for one month. She then returned to Hong Kong in 1997. She spent three years in the Philippines and then back to Hong Kong to work and finally to Canada in 2006. She had been in the long-term caregiver program but failed to provide some documents and thus that Application was refused, and now the program does not exist. When her work permit was refused, she missed her restoration period and has tried to obtain a TRP and work permit.

[23] After noting that the other factors each favoured the Applicant remaining in Canada, the Officer determined that the Applicant's lengthy overstay in Canada was to be given substantial

negative weight. Indeed, this was the sole factor in favour of not granting this H&C. The Officer was of the view that it was a significant negative consideration, as it "demonstrate[d] the Applicant's failure to abide to immigration laws of Canada." They also noted that the Applicant "cannot expect to profit from the years … lived and worked in Canada illegally," since "[s]pending more time underground does not entitle those here illegally to achieve greater success on an H&C application."

[24] The Applicant submits that the Officer unreasonably focused on this factor, and did not conduct a holistic analysis of all of the factors, particularly in light of H&C considerations. The Respondent argues that it was reasonable and within the Officer's power – based on the jurisprudence – to draw a negative inference from such evidence of non-compliance.

[25] Officers are entitled to draw negative inferences from the fact that applicants were able to accrue the benefits of living and working in Canada by violating immigration laws for a substantial portion of their time (see, e.g. *Zlotosz v Canada (Citizenship and Immigration),* 2017 FC 724 at para 34). I also note the Officer's consideration of incentives in immigration law – that we ought not to interpret laws, nor H&C factors, in a way that creates an incentive for individuals to intentionally overstay for the purpose of creating a stronger claim to exceptional H&C relief.

[26] That being said, in the highly fact-specific circumstances before me, I agree with the Applicant. The Officer's analysis focused unreasonably on this sole blight, to the detriment and ignorance of the other factors.

[27] An H&C analysis must be, at its root, borne of compassion and shared human experience. As the oft-cited passage from *Kanthasamy* emphasizes, H&C considerations "refer to those facts, established by the evidence, which would excited in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another… cover[ing] sorrow or pity excited by the distress or misfortunes of another…" (para 13). Critically, for my purposes here, the application of this compassion requires an empathetic approach, "achieved by a decision-maker stepping into the shoes of an applicant and asking the question: how would I feel if I were her or him? In coming to the answer, the decision-maker's heart, as well as analytical mind, must be engaged."

[28] It is in the preceding that unreasonableness is to be found in the instant case. Though the Officer repeatedly emphasized that they conducted a "global assessment," merely stating an assessment as being global is insufficient to mend an assessment that is otherwise unreasonably focused on one factor. The Officer unreasonably focused on the Applicant's negative immigration history, without regard or compassion for the underlying reasons for this history. Her sole aim was to provide for her family. My review of the record indicates that the Applicant is not a person who – as implied by the Officer – was "spending … time underground … to achieve greater success on an H&C application." The Officer unreasonably focused on this possibility, and the implications thereof, without regard for the broader circumstances of her, as a single mother, providing for her family.

[29] Regardless of an applicant's immigration status, their positive, productive, and valuable contributions to Canada and the impact of that loss on the applicant must be given careful

attention even if they have not adhered to Canadian immigration laws in their stay in Canada (see: *Samuel v Canada (Citizenship and Immigration),* 2019 FC 227 at para 17; *Sebbe v Canada (Citizenship and Immigration),* 2012 FC 813 at paras 21-23; *Singh v Canada (Citizenship and Immigration),* 2019 FC 1142 at paras 32-33). As is well-established in the jurisprudence, section 25 has no purpose if an applicant is easily condemned for their immigration history, particularly when such is done at the cost of the other factors in their favour (*Dowers v Canada (Immigration, Refugees and Citizenship),* 2017 FC 593). Such analysis deviates from an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker, and is thus unreasonable.

(5) Cumulatively

[30] Reasonableness review is, as noted in *Vavilov,* not a line-by-line treasure hunt for error. However, the decision must nonetheless be lacking "sufficiently serious shortcomings in the decision such that it [does not] exhibit the requisite degree of justification, intelligibility and transparency." In the instant case, the Officer weighed several factors (establishment, best interests of the children, hardship, and immigration history), and reached a conclusion. In doing so, the Officer determined that the first three factors (establishment, BIOC, and hardship) pointed moderately in favour of the Applicant remaining in Canada, while the fourth factor (her negative immigration history) pointed strongly against it.

[31] It is, of course, not the role of this Court on judicial review to reweigh evidence that was before the decision-maker (*Vavilov* at para 125). However, that is not what I am doing. Rather, I have noted errors throughout the consideration of the factors such that it cannot be that the

decision meets the standard of justification, intelligibility, and transparency required by *Vavilov.* The Officer demonstrated flawed lines of reasoning and repeated errors that go to the underlying reasons for their decision, and demonstrate that they deviated from an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrained them. Particularly taken in light of the holistic, compassionate purpose of an H&C analysis, the Officer's analysis is unreasonable.

[32] The parties did not present a question for certification.

VI. Conclusion

[33] No question is certified.

[34] The application is granted.

JUDGMENT IN IMM-5270-20

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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