Federal Court  Cour fédérale

Date: 20230509

Docket: IMM-7005-22

Citation: 2023 FC 664

Ottawa, Ontario, May 9, 2023

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

LILUBEN BHIKHU MAKVANA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an Application for judicial review of a decision by a senior immigration officer [the Officer] dated June 17, 2022, denying the Applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow, the application is dismissed.

II. **Context**

A. *Background*

[3] The Applicant is a citizen of India. Her husband resides and works as a caregiver in Israel, while their son, born in 2015, lives with his paternal grandparents in India. The Applicant left India shortly after the birth of her child to work in Israel with her husband, before coming to Canada.

[4] The Applicant was first issued a permit to work in Canada in May 2016 based on a Labour Market Impact Assessment [LMIA], approved in 2015, for a job as a live-in caregiver. An immigration consultant assisted her with the application. This permit was valid until July 13, 2017. The Applicant then applied for and obtained another work permit based on a LMIA approved for a second employer. This permit was valid until June 21, 2019.

[5] The Applicant consulted another immigration consultant in February 2019 to discuss the future of her immigration status. The Applicant claims that she was advised by the second consultant to file an application for permanent residence [PR] under the Live-in Caregiver Program and later a Bridging Open Work Permit application.

[6] The PR application was refused in May 2019 on the basis that the Applicant did not apply for, nor was she examined for admission under the Live-In Caregivers Program before entering

Canada, and that the program had ended in November 2014. The Applicant says that she came to realize that her application had been submitted under the wrong category and should have been filed under the Interim Pathway for Caregivers category (which in turn ended in October 2019). As a result of these errors, the Applicant considered that she had been misled by the consultants and filed complaints to their governing body alleging negligence.

[7] The Applicant's application for an open work permit was denied following her PR refusal. Her employer wanted to hire her again and applied for a new LMIA in September 2019, which was refused due to incomplete documents. Another application for a LMIA was refused in October 2019. An application for a Work Permit with Restoration was refused in December 2019 due to having been filed without a valid LMIA. Her employer applied again for the third time for a new LMIA in December 2019 and received a positive decision in January 2020. The Applicant then filed for a Temporary Resident Permit in March 2020, which was refused in January 2021.

[8] The Applicant submitted her H&C application in June 2021.

B. *Decision under review*

[9] The Officer determined that the factors cited in the application were insufficient to grant an exemption on H&C grounds.

[10] While the Applicant had demonstrated some establishment in Canada through her work experience as a live-in caregiver and her previous employer was willing to rehire her, she had not

held a job since June 2019. Friends in Canada and her husband in Israel were currently financially supporting her.

[11] The Officer accepted that the Applicant had an expectation of receiving PR through the Interim Pathway for Caregivers process, and may have been able to do so if she had applied in time. However, the Officer also found it difficult to speculate on the outcome of an application that did not get filed. The Applicant knew she had arrived in Canada on temporary status. The Officer also weighed this against the fact that the Applicant had remained in Canada without authorization since 2019.

[12] The Officer considered a psychological assessment submitted in support of the application and noted that the Applicant was assessed over a single video meeting of unspecified length. The Officer accepted that the Applicant is suffering from a Major Depressive Disorder of Moderate Severity with Anxious distress, and found that this would add difficulty to returning to India, and gave it some consideration.

[13] The Officer noted that the Applicant's son resides in India with his grandparents and has been supported financially by his father and grandparents given that the Applicant has not worked since 2019. The Officer found that there was little in the application to demonstrate that refusal would cause financial hardship for the child. The Officer accepted that the Applicant wished to reunite with her son and agreed that it is in the best interest of the child to have his mother in his life. However, the Officer concluded there is little to demonstrate that the Applicant would be unable to reunite with her son in India, or that the child does not benefit

from having his grandparents involved in his life. The Applicant's claim that her in-laws considered that she had abandoned her family and their values was not given weight.

[14] The Officer also found speculative the claim that if the Applicant returns to India, her husband would have to remain in Israel as the couple would be unable to support themselves in India. Both had furthered their ,work experience in Israel and Canada. The Officer was not satisfied that the Applicant would face significant difficulty in re-establishing herself in India.

III. **Issues and Standard of Review**

[15] According to the parties, this judicial review application raises two issues:

1. Whether the Applicant has established a breach of procedural fairness; and
2. Whether the Officer's decision was unreasonable.

[16] There is also a preliminary issue: can this Court address the question of whether the two immigration consultants were incompetent in their representation of the Applicant?

[17] The parties and I agree that the standard of review for the merits of the Officer's decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*]. To determine whether the decision is reasonable, the reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para 99.

[18] In conducting a reasonableness review of factual findings, deference is warranted and it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44.

[19] The standard applicable to issues of procedural fairness is whether, "having regard to all of the circumstances and focusing on the nature of the substantive rights involved and the consequences for the individual affected," the procedure followed by the decision-maker was fair: Canadian Pacific Railway Company v Canada (Transportation Agency), 2021 FCA 69 at paras 46-47. This standard involves no deference to the decision-maker.

IV. **Analysis**

A. *Preliminary issue: can this Court address the question of whether the two immigration consultants were incompetent in their representation of the Applicant?*

[20] It is not disputed by the Respondent that the Applicant submitted complaints about the advice received from the two consultants to their governing body. However, there is no indication in the record of the outcome of those complaints. Aside from that, counsel for the Applicant conceded that the Court's protocol for allegations of professional incompetence, negligence or other conduct on the part of former legal counsel or other authorized representative had not been followed. Thus, there is no indication in the record that the former representatives were given notice of the allegations in these proceedings or provided with an opportunity to respond.

[21] This is not a case in which the alleged incompetence led directly to the adverse decision the Applicant is challenging. However, the Applicant argues that the Officer should have taken the consultants' alleged incompetence into consideration as a significant factor supporting her H&C application and argues that, in itself, was a breach of procedural fairness. But for the incompetence, she contends, her February 2019 application would have been filed in the correct category and accepted. This is tantamount to arguing that but for the incompetence of her former representatives, she would have gained PR status, her application for an exemption would have been unnecessary and she need not have applied for judicial review. While that is, in my view, wholly speculative, it also arguably invokes the Court's protocol as the Respondent contends.

[22] As stated by Madam Justice Strickland in *Gombos v Canada* (*Canada (Minister of Citizenship and Immigration)*) 2017 FC 850 at para 17:

> The test for addressing allegations of ineffective or incompetent assistance of counsel has been well defined by the jurisprudence (*Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at paras 39-43). First, the applicant must establish that the impugned counsel's acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted (*R v GDB*, 2000 SCC 22 at para 26 ("*GDB*")). The burden is on the applicant to establish both the performance and the prejudice components of the test to demonstrate a 2017 FC 850 (CanLII) breach of procedural fairness (*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 17). Incompetence of former counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 at para 12 (FCA) ("*Shirwa*"); *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36 ("*Memari*")). There is also a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*GDB* at para 27; *Yang v Canada (Citizenship and Immigration)*, 2008 FC 269 at paras 16, 18). Incompetence will only result in procedural unfairness in "extraordinary circumstances" (*Shirwa* at para 13; *Memari* at para 36; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC

> 1225 at para 38; *Nizar v Canada (Citizenship and Immigration)*, 2009 FC 557 at para 24). Further, a procedural protocol of this Court, Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court ("Procedural Protocol"), sets out the procedure applicants must follow when alleging counsel incompetence, which includes giving notice to former counsel.

[23] This is a threshold requirement and to the extent that the Applicant is suggesting that her allegations of incompetence are a basis for her judicial review of the Officer's H&C decision, this argument is not properly before the Court or particularized and shall not therefore be addressed.

B. *Was there a breach of procedural fairness?*

[24] The Applicant relies on *Egharevba v Canada (Citizenship and Immigration)*, 2013 CanLII 33228 (CA IRB) at para 86 [*Egharevba*] to argue that since the decision affects her interests in a fundamental way, the Officer had a duty to provide a meaningful opportunity for the Applicant to provide further information and to address their concerns.

[25] I note that *Egharevba*, a decision of the Immigration Appeal Division, was subsequently reversed by Campbell J. without reasons (IMM-2921-13). However, the statement of principle expressed in paragraph 86 of the IAD decision is drawn from *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at para 15 and is not controversial. But it does not assist the Applicant.

[26] As stated by Madam Justice Pallotta in *Kaur v Canada (MCI)*, 2021 FC 1242 at paras 31 and 32:

> [31] 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, or provide an opportunity to fill in gaps in the evidence: Kisana v Canada (Minister of Citizenship & Immigration), 2009 FCA 189 at para 45; Singh v Canada (Minister of Citizenship and Immigration), 2014 FC 983 at para 7.
>
> [32] The Officer's concern relates to the sufficiency of Ms. Kaur's evidence. Ms. Kaur was required to "put her best foot forward" to establish her allegations: *Bradshaw v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 632 at paras 76-83. In the circumstances, the Officer was not required to provide notice and an opportunity to respond to the concern.
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> [Emphasis added]

[27] There was no breach of procedural fairness by the Officer in not providing the Applicant an opportunity to augment her application and address the deficiencies which the Officer found therein.

C. *Is the decision reasonable?*

[28] The Applicant contends that she provided documentary evidence the Officer did not consider, notably the psychological assessment which stated that the Applicant would deteriorate psychosocially if her application on H&C was denied and her evidence of establishment in Canada. She further argues that the Officer failed to take into account the best interests of her son including his dependence upon her despite their long separation.

[29] In my view, the Applicant's arguments fall short of establishing that the decision is unreasonable. The Officer accepted the psychologist's long-distance diagnosis despite the slim evidentiary record upon which it was based, and referred to it in several portions of the decision. The Officer gave some weight to the psychological assessment in finding that her depressive disorder would add difficulty to returning to India.

[30] The Officer explicitly referred to the evidence of the Applicant's establishment in Canada, based exclusively on her relatively short work history in this country, and took into account that she was being supported by her friends. There was little else in the nature of establishment evidence submitted for the Officer to consider.

[31] The child's situation is troublesome as he has been separated from his parents for most of his young life. However, that was a decision taken by the Applicant and her husband in the interests of becoming established abroad. The Officer squarely addressed the child's best interests and found that they would not be compromised if the Applicant returned to India. In my view, there is nothing unreasonable about that conclusion. There was little evidence in the record to support the assertion that the Applicant and her child would be separated because of the animosity of her in-laws should she return.

[32] The Officer gave negative consideration to the fact that the Applicant remained in Canada without authorization since 2019 finding that this showed "a disregard for Canadian immigration law". This was unreasonable as it does not seem to consider that she ended up in her

situation, without status, through no apparent fault of her own: *Trinidad v Canada (Citizenship and Immigration)*, 2023 FC 65 at para 24.

[33] However, this is not such a serious shortcoming that the decision cannot, as a whole, exhibit the requisite degree of justification, intelligibility and transparency. Overall, the application for an exemption was not strong, and the Officer properly dealt with the grounds and the evidence submitted. As stated in *Vavilov* at para 100, it would be improper for a reviewing court to overturn an administrative decision because its reasoning exhibits a minor misstep.

V. **Conclusion**

[34] The sequence of events which have led to this judicial review were unfortunate for the Applicant. No doubt she had high expectations that her opportunity to work in Canada would lead to long term benefits for her family. However, the Officer reasonably concluded that the Applicant's particular circumstances, hardships and best interest of the child were not sufficient to be granted an exceptional remedy under section 25(1) of *IRPA*, and I am satisfied that there was no breach of procedural fairness in how that decision was reached.

[35] For these reasons, the application is dismissed. Neither party proposed a serious question of general importance and none will be certified.

JUDGMENT IN IMM-7005-22

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7005-22
STYLE OF CAUSE:	LILUBEN BHIKHU MAKVANAV THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 19, 2023
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	MAY 9, 2023

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