Federal Court



Cour fédérale

Date: 20240328

Docket: IMM-8438-22

Citation: 2024 FC 493

Toronto, Ontario, March 28, 2024

PRESENT: The Honourable Mr. Justice A. Grant

Docket: IMM-8438-22

BETWEEN:

IARA CALDEIRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] These are my reasons for granting this application for judicial review. The Applicant is a citizen of Brazil. In August 2021, she filed a second application for permanent resident status from within Canada based on humanitarian and compassionate (H&C) considerations under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

- [2] Ms. Caldeira's application was based on her family ties to Canada, her health concerns, and adverse country conditions that she would face in Brazil, including a lack of adequate housing, a lack of family support compared to what she receives in Canada, and the prevalence of crime and violence in Brazil.
- [3] A Senior Immigration Officer [the Officer] refused the application in a decision dated August 10, 2022. The Applicant now seeks judicial review of this decision. For the reasons that follow, I find that while the Officer's decision was generally thorough and well-reasoned, it was, on one central issue, unreasonable. As such, I grant this application for judicial review.

II. <u>Background</u>

- [4] The Applicant is a 70-year-old woman and, as mentioned, a citizen of Brazil. She arrived in Canada in April 2015 under a visitor visa. Since her arrival, the Applicant has been living with her sister and brother-in-law.
- [5] In 2016, the Applicant initiated a claim for refugee protection which was withdrawn two years later on advice of counsel who also advised her to submit an H&C application.
- In 2018, the Applicant submitted her first H&C application, which was refused in August 2020. This Court denied leave to judicially review this decision in February 2021. The Applicant submitted her second H&C application on August 23, 2021.

- [7] As part of her H&C application, the Applicant provided numerous letters of support from her siblings and family members in both Brazil and Canada. In their letters, the Applicant's siblings in Brazil expressed their own struggles and their inability to provide the Applicant with financial or other forms of support in Brazil. By contrast, the Applicant's siblings in Canada expressed both their desire and ability to support her in Canada.
- [8] The Applicant provided medical documents in support of her application indicating that she has been diagnosed with acute diabetes, depression, hypertension, and dyslipidemia. Also as part of her application, the Applicant explained that before arriving in Canada, she faced difficulty finding housing and support for herself as she is a single elderly woman and she has limited education and work experience.

A. Decision under Review

- [9] In refusing the H&C application, the Officer found the Applicant's circumstances did not warrant the requested exemption under subsection 25(1) of the *IRPA*. The Officer's findings are summarized below:
 - A. <u>Community Establishment</u>: The Officer afforded some positive weight to the Applicant's community establishment, noting the Applicant's family ties, attendance in ESL courses, and photos which showcase her life in Canada. However, the Officer noted that the Applicant has a greater number of family members living in Brazil than in Canada, indicating that her ties in Brazil are stronger than those in Canada. The Officer also found that the Applicant's contravention of immigration laws in Canada and lack of status reduce the weight of the Applicant's establishment in Canada.

- B. <u>Financial Self-sufficiency</u>: While the Officer did not draw a negative inference from the Applicant's lack of employment, her reliance on social assistance rendered her inadmissible under section 39 of the *IRPA*, and attracted negative weight.
- C. <u>Health Issues</u>: The Officer afforded little weight to the Applicant's health issues, finding that the Applicant's health conditions primarily require prescriptions to manage. While acknowledging that Brazil's healthcare quality is generally lower than Canada's, the Officer found there to be insufficient evidence to conclude that the Applicant would be unable to access her medication in Brazil.
- D. <u>Adverse Country Conditions</u>: Overall, the Officer gave some positive weight to Brazil's adverse country conditions.
 - i. <u>Crime in Brazil</u>: The Officer found the Applicant may face some personalized hardship in Brazil stemming from the prevalence of crime and violence. However, the Officer also found there was little evidence of personalized hardship, noting that the country conditions evidence primarily established generalized hardship, which the Officer observed warrants little consideration in an H&C analysis.
 - ii. Economic Conditions in Brazil: The Officer found the Applicant would be able to financially support herself in Brazil through pension and disability payments from the Brazilian government. While the Officer noted the Applicant would need to reapply for the benefits, the Officer found that doing so would not constitute hardship as these were payments the Applicant voluntarily withdrew from. The Officer also noted three of the Applicant's brothers in Brazil relied on pension payments.
 - iii. Covid-19 Pandemic: While the Officer accepted that the Applicant faces personalized hardship from the pandemic due to her profile and the pandemic's harsher impact in Brazil, the Officer also found the severity of the pandemic's effects in Brazil have subsided since its onset.

III. <u>Preliminary Matter</u>

[10] As noted by the Respondent, there are medical records relating to a third party who has no connection to the Applicant's file. While this mistake appears to have been corrected in the Applicant's Record, the third party medical material is still contained in the Certified Tribunal Record at pages 139-140. I direct the Registry to remove these pages from the Certified Tribunal Record.

IV. Issues and Standard of Review

- [11] The Applicant sets out three issues that touch on the merits of the Decision. For the sake of my analysis, I have re-ordered these issues, as follows:
 - A. Whether the Officer erred in requiring the Applicant to demonstrate stronger familial ties in Canada than in Brazil.
 - B. Whether the Officer erroneously conducted a selective review of the evidence and unreasonably discounted relevant country condition evidence.
 - C. Whether the Officer erred by discounting the Applicant's evidence of establishment in Canada because she overstayed her visitor visa.
- [12] The parties agree that the applicable standard of review in respect of the decision is reasonableness, as instructed by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[13] Reasonableness is a deferential, but robust, standard of review: Vavilov at paras

12-13. The Court must determine whether the decision under review, including both its rationale

and outcome, is transparent, intelligible and justified: Vavilov at para 15. 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. Whether a

decision is reasonable depends on the relevant administrative setting, the record before the

decision-maker, and the impact of the decision on those affected by its consequences: Vavilov at

paras 88-90, 94 and 133-135.

[14] In this case, the burden is on the Applicant to demonstrate that the underlying decision is

unreasonable. Doing so requires the Applicant to establish that the decision contains flaws that

are sufficiently central or significant: Vavilov at para 100. Not all errors or concerns about a

decision will warrant intervention. A reviewing court must refrain from reweighing evidence

before the decision-maker, and it should not interfere with factual findings absent exceptional

circumstances: Vavilov at para 125. Flaws or shortcomings must be more than superficial or

peripheral to the merits of the decision, or a "minor misstep:" Vavilov at para 100.

V. Analysis

[15] Applications for permanent residence from within Canada are governed by subsection

25(1) of the *IRPA*, which provides:

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 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 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 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 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.
- [16] In Kanthasamy v Canada (Citizenship and Immigration), 2015 SCC 61 [Kanthasamy], the Supreme Court affirmed that H&C relief should be warranted 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 citing Chirwa v Canada (Minister of Citizenship and Immigration) (1970), 4 IAC 338 at 350. In applying the H&C test, an officer is required to consider and weigh all relevant facts and factors to determine whether such equitable relief is justified: Kanthasamy at para 25.
- [17] The *Kanthasamy* decision also reminds us that there will inevitably be some hardship associated with being required to leave Canada, that H&C relief is not intended to be an

alternative immigration scheme, and that it is an exceptional and discretionary remedy: *Kanthasamy* at para 23.

- [18] This Court may be required to set aside an H&C decision on grounds that the officer failed to demonstrate a compassionate approach; unduly focused on hardship rather than conducting an assessment of all relevant factors; failed to grapple with the applicant's particular circumstances; or engaged in a segmented analysis rather than a holistic one: *Muti v Canada* (*Citizenship and Immigration*), 2022 FC 1722 at para 10, citing *Marshall v Canada* (*Citizenship and Immigration*), 2017 FC 72 at paras 33-35; *Zhang v Canada* (*Citizenship and Immigration*), 2022 FC 277 at paras 36-37; and *Reducto v Canada* (*Citizenship and Immigration*), 2020 FC 511 at paras 50-51.
- A. Did the Officer err in their assessment of the Applicant's family ties in Canada?
- [19] The Applicant argues that the H&C decision is unreasonable because of the Officer's assessment of her family relationships, both in Canada, and in Brazil. For the reasons that follow, I agree.
- [20] In discussing the Applicant's family ties, the Officer stated:

The letters of support from family members include letters from the applicant's siblings, her brother-in-law, a niece and two of her nephews. These letters speak to Ms. Caldeira's kindness and generousity [sic], as well as emphasizing her love of Canada. I accept that the applicant enjoys living in Canada and has family ties here, however the support from Ms. Caldeira's family offers little evidence for the applicant's establishment in her community beyond these family ties. Furthermore, Ms. Caldeira has a greater number of

family members living in Brazil than in Canada, indicating to me that the applicant's family ties in Brazil are stronger than her ties in Canada. [emphasis added]

- [21] At the outset of my analysis I would note that the Applicant's family relationships were at the heart of her H&C application. Earlier parts of her life were spent caring for her family, while more recently, she has become dependent on family members, most notably her Canadian siblings. She has limited work experience outside of the care she has provided to her family. She initially came to Canada because she was struggling in Brazil, and her family in Canada wanted to assist her.
- [22] As alluded to above, the Applicant submitted six letters from family members in Brazil, all of whom stated that they simply could not provide any support to the Applicant if she were to return to Brazil. By contrast, the Applicant submitted another six letters from family members in Canada, all of whom indicated that they support her and appreciate having her in their lives.
- [23] In this context, the Officer's finding that the Applicant's "family ties in Brazil are stronger than her ties in Canada" is simply incompatible with the evidence in the record. To return to *Vavilov* for a moment, this finding represents both an important flaw in the overarching logic of the decision, and a fundamental misapprehension of the evidence contained in the record: *Vavilov* at paras 102, 126.
- [24] The Applicant's family ties are but one factor in the larger constellation of considerations that were at play in the H&C application. That having been said, it is clear that the Applicant's family relationships and more specifically, her relatively stronger relationships with her

Canadian family than her Brazilian one – formed a central pillar in her application for humanitarian and compassionate relief. This pillar may not ultimately warrant exceptional relief, but it had to be considered on its own terms. As such, I find that this error provides a sufficient basis on which to conclude that the Officer's decision was unreasonable.

- [25] While the above analysis is dispositive of this application for judicial review, I will briefly consider the other arguments, as articulated by the Applicant.
- B. Did the Officer err by engaging in a selective review of the evidence?
- [26] As part of her H&C application, counsel for the Applicant stressed that crime and violence in Brazil are rampant and that as an elderly woman, the Applicant would be more susceptible to violence in Brazil. Counsel's submissions in support of the H&C application centred on evidence of high rates of police violence and gender-based violence. In her H&C affidavit, the Applicant recounted three incidents of violence that she had experienced: (1) the Applicant's brother was murdered in 1968, outside the family's home; (2) the Applicant's sister-in-law was robbed with the Applicant and Applicant's niece in the car with her; and (3) the Applicant's brother was kidnapped.
- [27] The Officer acknowledged these incidents, and further acknowledged that, as an elderly woman, the Applicant was likely to be more vulnerable to crime in Brazil than "someone of a different profile." That said, the Officer also observed that the Applicant had resided in Brazil for over 60 years and that her personal experience of crime was limited. The Officer also observed

that information about general crime rates in Brazil warranted limited consideration in the analysis of the *personal* hardship the Applicant may experience if she were to return to Brazil.

- [28] The Applicant submits the Officer failed to engage in a proper assessment of the record by selectively relying on evidence related to general criminality in Brazil, while failing to pay adequate attention to the personal experiences of criminality faced by the Applicant.
- [29] The Respondent argues that the Applicant's submissions in this regard amount to a disagreement with the weight attributed to the evidence, and an invitation for the Court to reweigh this evidence, which is not the role of courts sitting on judicial review. In this regard, I agree with the Respondent.
- [30] Read as a whole, I find that the Officer appropriately engaged with the evidence related to both the Applicant's personal experience of crime over the course of her life in Brazil, and with the general country conditions evidence. The Officer found that the Applicant had experienced some crime-related hardship in Brazil and attributed weight to the vulnerability of the Applicant, but also noted that information related to general crime rates in a country is of limited assistance in assessing personal hardship. Taking the above into consideration, I do not find the Officer's decision in this regard to be unreasonable.
- C. Did the Officer err by finding the Applicant overstayed her visitor visa and did the Officer discount the Applicant's evidence on establishment as a result?

- [31] The Applicant also submits that the Officer erred by overly focusing on the fact that she had stayed in Canada beyond her legal status, while under-emphasizing the fundamental basis of the H&C application. Doing so, the Applicant argues, is a form of circular reasoning: if the Applicant seeks an H&C exemption *because* of her lack of status, that lack of status should not be relied upon as a reason to deny the exemption: *Lopez Bidart v Canada*, 2020 FC 307 at para 32.
- [32] While I agree with this proposition as a general statement of law, this Court has also found that it is not unreasonable for officers to consider an applicant's immigration history in the assessment of their establishment in Canada. As Justice McHaffie recently stated in *Browne*, "it is not unreasonable for an officer to take into account the circumstances giving rise to the establishment, including lack of status or misrepresentations, and to conclude that the positive weight to be given to establishment ought to be attenuated because of those circumstances": *Browne v Canada (Citizenship and Immigration)*, 2022 FC 514 at para 28 [*Browne*].
- [33] Considering the above, I find this element of the Officer's decision to be reasonable. The Officer engaged with the evidence related to the Applicant's establishment in Canada and afforded this evidence positive weight, while determining that this weight was somewhat diminished by the Applicant's failure to comply with the terms of her authorization to be in Canada. This reasoning appears consistent with the Court's findings in *Browne*.

VI. Certified Question

- [34] After concluding his submissions, counsel for the Applicant indicated that he did not propose a serious question of general importance, as referred to at paragraph 74(d) of the *IRPA*. However, in commencing his reply arguments, counsel proposed the following two questions:
 - i. In assessing an individuals family ties, is it sufficient to consider the quantity of family members in Canada and elsewhere, without further assessment of the quality of those family ties in both countries?
 - ii. In assessing the impact of an overstay, should it be a requirement for an Officer to explain which parts of the establishment analysis were impacted by an overstay and which part were not?
- [35] At the hearing, I indicated to counsel that I would not certify these questions. First, I noted that the Applicant's request was not in compliance with the *Consolidated Practice*Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings, which provides in part:

Parties are expected to make submissions regarding paragraph 74(d) in written submissions filed before the hearing on the merits and/or orally at the hearing. Where a party intends to propose a certified question, opposing counsel shall be notified at least five (5) days prior to the hearing, with a view to reaching a consensus regarding the language of the proposed question.

[36] More importantly, I find the proposed questions do not meet the test for certification. For a question to be certified, it "must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance": *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46.

[37] In my view, the proposed questions are not of broad significance or general importance. The first question essentially asks whether decision-makers are to engage with the substance, rather than the form, of the evidence before them. I believe the jurisprudence has already settled that question. The second question is fact-specific and would not be dispositive of the appeal, as I have already determined that this matter must be returned to a new decision-maker for unrelated reasons.

VII. Conclusion

[38] The application for judicial review is granted for the reasons set out above.

JUDGMENT in IMM-8438-22

THIS COURT'S JUDGMENT is that:

- 1. The application for judicial review is granted.
- 2. The matter is returned for redetermination by a different decision-maker.
- Pages 139-140 of the Certified Tribunal Record are to be removed from the Record.
- 4. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED: MARCH 28, 2024

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