Federal Court Cour fédérale

Date: 20220511

Docket: IMM-3279-21

Citation: 2022 FC 695

Ottawa, Ontario, May 11, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

MARCIA VICTORIA WILLIAMS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a 60-year-old citizen of Jamaica, seeks judicial review of a negative decision of a Senior Immigration Officer [Officer] dated April 30, 2021 refusing the Applicant's second application for permanent residence from within Canada based on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant entered Canada in March 2012 and overstayed her temporary resident status for several years before initiating a refugee claim, which was refused by the Refugee Protection Division of the Immigration and Refugee Board on September 5, 2017.

[3] The Applicant submitted her first H&C application, which was refused on June 21, 2018, and a pre-removal risk assessment [PRRA] application, which was refused on January 25, 2019. While the Applicant initially cooperated with the Canada Border Services Agency to arrange to leave Canada, she ultimately did not appear for her removal from Canada and on April 17, 2019, a warrant was issued for her arrest.

[4] On September 2, 2020, the Applicant filed a second H&C application. The Applicant submitted that: (a) the fact that she worked as a front-line personal support worker during the COVID-19 pandemic should be given heavy weight; (b) she is well-established in Canada despite her challenges in regularizing her status and has been financially independent; (c) while in Canada, she has provided financial support to her adult children and her grandchildren in Jamaica; (d) she has upgraded her education while in Canada and established strong connections with her church, friends and her boyfriend; (e) if forced to return to Jamaica, the Applicant would face significant hardships, including the loss of the financial stability that working in the Canadian economy has brought for her and her family due to the lack of employment and presence of workplace discrimination in Jamaica, the loss of her Canadian church community and her best friend and her boyfriend, and the hardship of returning to a country where she suffered abuse from her former spouse; and (f) the interests of the Applicant’s sixteen grandchildren in Jamaica would be

negatively impacted if her application was rejected as they live on the edge of poverty and rely on the Applicant for financial support for school and medical care.

[5] By decision dated April 30, 2021, the Officer found that: (a) the Applicant had demonstrated a small amount of positive establishment; (b) the Applicant did not sufficiently demonstrate that she would experience hardship if she returned to Jamaica; and (c) it would be in the best interest of her grandchildren if she returned to Jamaica. The Officer was not satisfied that the H&C considerations before them justified an exemption under section 25(1) of the *IRPA*.

[6] On this application for judicial review, the Applicant asserts that the decision of the Officer should be set aside on the basis that: (a) the Officer erred in mitigating the weight given to the Applicant's establishment in Canada because the Applicant worked and stayed in Canada without authorization; (b) the Officer erred in assigning little weight to the Applicant's sworn affidavit regarding her front line work as a personal support worker during the pandemic and failed to provide any explanation for mitigating the probative value of that evidence provided under oath and under sanction of criminal law punishment; (c) the Officer's assessment of the country conditions ignored and misstated the evidence and was internally inconsistent; and (d) the Officer breached the Applicant's procedural fairness rights by making a veiled credibility finding against the Applicant without affording her an opportunity to address the Officer's credibility concerns at an oral interview.

[7] For the reasons that follows, the application for judicial review shall be dismissed.

I. Issues and Standard of Review

[8] The following issues arise on this application:

A. Whether the decision of the Officer was reasonable; and

B. Whether there was a breach of procedural fairness.

[9] With respect to the first issue, the presumptive standard of review is reasonableness and I find that no exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65* at paras 23, 25]. When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. 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 [see *Vavilov*, supra at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenjij-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

[10] With respect to the second issue, the Court's review of procedural fairness issues involves no deference to the decision-maker. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual affected [see *Canadian Pacific Railway Company v Canada*

(Transportation Agency), 2021 FCA 69 at paras 46-47]. The ultimate question is whether the Applicant knew the case to meet and had a full and fair chance to respond [see *Laag v Canada (Minister of Citizenship and Immigration)*, 2019 FC 890 at para 10].

II. Analysis

A. The Officer's Decision was Reasonable

[11] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. An H&C determination under section 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 28; *Caleb v Canada (Citizenship and Immigration)*, 2020 FC 1018 at para 10].

[12] The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore "deserving of considerable deference by the Court" [see *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30]. There is no "rigid formula" that determines the outcome [see *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 7].

(1) Establishment

[13] The Applicant asserts that the Officer improperly diminished the weight given to her establishment in Canada because of the Applicant's unauthorized work and unauthorized stay in Canada. The Applicant, citing *Baeza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 362, asserts that this Court has expressly held that it is unfair to use evidence of steady albeit unauthorized employment against an Applicant when the Ministerial Guidelines give favourable regard to this factor. The Applicant asserts that the issue in an H&C application is whether a person without status can remain in Canada, and that understood in this way, it is inimical to the very purpose of the program to then punish an applicant for working without status by reducing the weight given to work history if it was gained without a work permit.

[14] The Applicant asserts the Officer referenced three factors in assigning negative weight to the Applicant's establishment in Canada, and that although her failure to appear for removal was a factor for consideration, the other two factors, namely her unauthorized work and time in Canada without status, were not. The Applicant asserts that in relying on these irrelevant factors, the Officer rendered an unreasonable decision on the issue of establishment. The Applicant also asserts that the Officer's reasons failed to address her submissions that an officer could not penalize or deduct establishment points for work without authorization, which is contrary to the justification in decision-making required by *Vavilov*.

[15] In *Rozgonyi v Canada (Minister of Citizenship and Immigration)*, 2022 FC 349 at paragraphs 29-30, Justice McHaffie recently addressed a very similar argument and held:

> [29] Finally, the family criticizes the officer's reference to their work without legal authorization and their comments that "this does not weight in their favour". They point to *Fidel Baeza*, in which Justice O'Reilly concluded that "[i]t would not be fair to use evidence of steady employment against [the applicants] simply because work permits did not cover the entire period of their time in Canada": *Fidel Baeza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 362 at para 16.
>
> [30] In my view, there is a balancing to be undertaken in these considerations. On the one hand, subsection 25(1) effectively presupposes a failure to comply with one or more provisions of the *IRPA* and is designed to provide relief from that non-compliance: *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23. On the other hand, this Court has recognized that evidence of establishment, including employment, may be considered in light of the circumstances giving rise to it, including illegality: *Aguilar Sarmiento v Canada (Citizenship and Immigration)*, 2017 FC 481 at paras 6, 15; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at paras 46, 48; *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 26–27. In my view, the officer's decision in this case reasonably undertook that balancing, finding the applicants' employment, friendships, and efforts "commendable," while still noting that work in Canada without legal authorization "does not weigh in their favour."

[16] I agree with the comments expressed by Justice McHaffie and find that they equally apply in this case, such that it was not improper for the Officer, as part of their balancing exercise, to assign negative weight to the Applicant's unauthorized work and unauthorized stay in Canada.

[17] I find that the Officer carefully considered both the evidence and the submissions of the Applicant in relation to her immigration history, her financial independence and status in Canada, her financial support of her family in Jamaica, her employment history, her personal relationships in Canada, and her educational and volunteer pursuits. After balancing the positive elements of the Applicant's establishment against the negative elements of her establishment, I find that the Officer reasonably determined that the Applicant had only established a small amount of positive

establishment. It is not the Court's role to undertake a reassessment or reweighing of the establishment factor where, as here, the Officer's assessment thereof is not unreasonable.

(2) The Applicant's Affidavit Evidence

[18] In her H&C application, the Applicant asserted that her work as a personal support worker in a long-term care home during the COVID-19 pandemic should be weighed heavily in favour of granting her application, given that the Applicant met some of the Federal Government's criteria for the recently opened pathway to permanent residency for front-line healthcare workers who worked in that capacity during the COVID-19 pandemic.

[19] The Applicant asserts that she attempted to confirm her employment history and other important details supporting her H&C claim through sworn affidavit evidence. In the case of her employment history, she attested to her various forms of employment since arriving in Canada and stated that she was unable to obtain documentation directly from present and former employers (including her employer during the pandemic), presumably because these employers do not want the government to find out that they employed her without authorization to work in Canada.

[20] In their decision, the Officer considered the Applicant's evidence regarding her employment history in Canada and stated:

> Counsel submitted that the applicant does not qualify for a pathway to permanent residency available to those working in Canada's health-care sector because she did not hold a valid work permit. However, counsel stated that her contributions as a personal support worker should still be weighed in her favour. However, I note that

> outside of her personal statements in her affidavit, there is little objective evidence on file to demonstrate that the applicant worked as a personal support worker or in the health-care sector. I note that there is little indication that the three employers listed in her T4 are in the health-care sector or hired her as a personal support worker. There is also no information about her employers that can be found on her paystubs, other than their employer number. I find that the applicant submitted insufficient evidence to demonstrate that she worked as a personal support worker or worked in the health-care sector. I assign little weight to this factor.

[21] The Applicant asserts that the Officer failed to understand and to grapple with the nature and legal implications of the sworn statements that the Applicant made in her affidavit. In swearing to the truth of its contents, she asserts that she committed herself to the truth and to the criminal penalty for perjury for failing to tell the truth. The Applicant asserts that this renders the probative value of her affidavit very high. Understood in this context, the Applicant asserts that no further objective evidence was required in order for the Officer to accept what the Applicant said in her affidavit. By requiring further objective evidence and not explaining why the Applicant's affidavit was insufficient (which the Applicant asserts contained extensive details about her work history), the Applicant asserts that the Officer erred.

[22] Further, the Applicant asserts that, given the probative value of the evidence provided by the Applicant, it appears that the Officer simply did not believe her evidence and thus made a veiled credibility determination.

[23] I reject the Applicant's assertions. An applicant cannot rely on the presumption of truthfulness of a sworn statement without providing sufficient evidence to support the key elements of a claim [see *Lin v Canada (Minister of Citizenship and Immigration)*, 2022 FC 341 at para 28;

Barros Barros v Canada (Citizenship and Immigration), 2022 FC 9 at para 50]. Moreover, it cannot be assumed that in cases where an officer finds that an applicant's evidence does not establish the applicant's claim that the officer has not believed the applicant. An applicant may have tendered evidence of each essential fact to make out a particular claim, but she may not have met the legal burden because the evidence presented does not prove the facts required on a balance of probabilities [see *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 23; *Gao v Canada (Minister of Citizenship and Immigration)*, 2014 FC 59 at para 32].

[24] In this case, I find that the Officer made no finding regarding the Applicant's credibility (veiled or otherwise). Rather, the Officer was simply not satisfied that sufficient objective evidence had been presented by the Applicant on the issue of her employment as a personal support worker or in the healthcare sector. Officers are entitled to significant deference where findings of sufficiency are concerned, provided that the insufficiency is explained and not used as a disguised means of making credibility findings [see *Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14 at para 35]. Here, the Officer adequately explained the deficiency in the Applicant's evidence by pointing to the limitations in the evidence provided and what was missing therefrom.

[25] Moreover, the lack of sufficiency of the Applicant's evidence regarding her employment was one of the many evidentiary deficiencies properly noted by the Officer. For example, with respect to the Applicant's financial status, the Officer noted:

> According to the applicant's personal history in her application, the applicant was employed continuously from May 2012 until present.

> I note that apart from her personal statements in her affidavit, there is little objective evidence submitted relating to her employment and financial situation from 2012 to 2017…. The applicant stated in her affidavit that she was employed at Better Home Care, but I note that no evidence to support this was found in the application. The applicant stated in her affidavit that she is currently employed as a caregiver in a private home and she is paid $2200 per month. I note that the applicant has not submitted any evidence in support of her employment, such as a letter from her employer. Based on her submissions, I note that it is unclear how the applicant has supported herself since arriving to Canada. I find that the applicant submitted insufficient evidence to demonstrate financial stability or independence.
>
> [emphasis added]

[26] With respect to the Applicant's financial support to her family, the Officer noted:

> Counsel stated that during her time in Canada, the applicant sent money to her family in Canada to provide for their basic needs and education. In support of this fact, the applicant submitted various letters from her family in Jamaica. I note that in these letters, her family indicated that the applicant provided financial support to them. However, I note that the letters speak to the applicant's support to her family while she was in Jamaica and it is unclear to what capacity the applicant has continued to support them financially after coming to Canada. In addition to the letters, I note that the applicant also submitted a copy of one money transfer receipt to her daughter Sherica dated in April 2020. Although I do not doubt that the applicant has provided some financial support to her family in Jamaica, I find that the applicant submitted insufficient evidence to demonstrate that her family primarily relied on her for financial support. Especially considering the applicant's uncertain financial status mentioned above, I find that she submitted insufficient evidence to demonstrate that she was the main financial supporter of her family consisting of 6 adult children and many more grandchildren.
>
> [emphasis added]

[27] With respect to the Applicant's best interests of the child claim, the Officer noted:

Counsel stated that the applicant has 17 grandchildren in Jamaica who would be greatly affected by the loss of the applicant's Canadian income. However, I note that neither counsel or the applicant clearly state who most of these grandchildren are. I note that in a letter of support by the applicant's daughter Sherica, she stated that she became pregnant with her only child, Sherigay, at the age of 14. Based on the family information provided, I note that Sherica is 38 years old, meaning her child, or the applicant's grandchild, would be 24 years old. In another letter written by the applicant's daughter Dawn dated in September 2020, she stated that she has two children aged 13 and 2. I note that little to no other information were provided about the applicant's 14 other grandchildren.

….

The applicant stated in her affidavit that one of her youngest grandson has a heart condition and he needs to have expensive medical test and medications that she helps to pay. I note that while the applicant stated that he is one of her youngest grandson, there is no other information, such as name or age, provided. I also note that the applicant has not submitted any objective evidence of her grandson's medical condition or that she helps pay for his medical bills and treatments.

….

I accept that the applicant may have some grandchildren that are of BIOC age. As discussed in the previous section under establishment, I acknowledge that the applicant provided some financial support which likely benefited her grandchildren. However, there is insufficient evidence that her family primarily relied on her for financial support or that the applicant was capable of providing the type of financial support alleged given her financial status in Canada. Furthermore, I note that in a letter by one of the applicant's granddaughter, Sherigay, she stated that she is employed with the Ministry of Education, which would indicate that she is not reliant on the applicant's financial support. I find that there is insufficient evidence that the loss of the applicant's Canadian income would greatly affect her grandchildren.

[emphasis added]

[28] With respect to the Applicant's assertion that she and her family are at risk of falling into poverty without her Canadian income, the Officer noted:

> I find counsel's statement that the applicant and her family would fall into poverty without her Canadian income to be largely baseless. Although the applicant's affidavit and the letters of support from her family does mention that some of her children were unemployed at one point in their lives, I note that there is no evidence that suggests everyone is currently unemployed and unable to support themselves without the applicant's financial support from her Canadian income.
>
> [emphasis added]

[29] The onus was on the Applicant to include pertinent information and evidence in support of her H&C application and any lack of evidence or failure to adduce relevant information in support of her H&C application was at the peril of the Applicant [see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paras 35, 45 and 61; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5]. In this case, the Applicant had ample time to either gather evidence or explain why she could not do so. While an explanation was provided for certain missing evidence, there were certainly many other forms of evidence that could have been provided to support the Applicant's affidavit evidence regarding her employment as a personal support worker or in the healthcare sector, as well as additional particulars about her employment in Canada that could have been provided by the Applicant herself in her affidavit. In that regard, I reject the Applicant's assertion that her affidavit contained "extensive details" about her work history.

[30] Deciding whether evidence is sufficient is a practical judgment made on a case-by-case basis, to which the Officer is entitled to significant deference. I am not satisfied that the Applicant

has established a basis to interfere with the Officer's determination that, due to the insufficiency of evidence, little weight should be assigned to the Applicant's employment as a personal support worker during the COVID-19 pandemic.

[31] While at the hearing the Applicant stressed that the central component of her H&C application was her role as a front-line worker during the COVID-19 pandemic and that the Officer failed to adequately address this contention, I find that this is not an accurate characterization of the Applicant's submissions made in support of her H&C application. While she did assert that heavy weight should be given to her work during the COVID-19 pandemic, a fair reading of her submissions demonstrates that it was but one of many factors emphasized by the Applicant, the other significant factors being her role in providing financial support to her children and grandchildren in Jamaica and the potential personal and financial hardships of returning to Jamaica. Moreover, contrary to the Applicant's assertion, I find that the Officer did not ignore, but rather expressly addressed, her submission regarding the weight to be placed on her work during the COVID-19 pandemic.

(3) Adverse Country Conditions

[32] The Applicant asserts that the Officer's determination in relation to the hardship the Applicant may face in finding work in Jamaica was inconsistent and thus unintelligible, having found on the one hand that she may suffer hardship as it relates to obtaining employment, while on the other hand finding that there was little evidence that the Applicant would experience great difficulties in Jamaica given the additional education and experience she gained while working in Canada. I see no such inconsistency. A fair reading of the Officer's decision is that the Officer

found that the Applicant may experience hardship in finding employment in Jamaica, but that her prospects for finding employment were enhanced by the education and experience that she acquired while in Canada.

[33] The Applicant further asserts that the Officer failed to consider the risk to the Applicant of discrimination and sexual harassment were she to return to Jamaica. However, a review of the Applicant's submissions in support of her H&C application reveals that this alleged risk was not a stand-alone submission, but rather formed part of the Applicant's submissions regarding the Applicant's ability to find stable work in Jamaica as an older woman working as a domestic worker, which submissions were expressly addressed by the Officer.

[34] While the Applicant made additional arguments at the hearing about the Officer's consideration of the potential hardship to the Applicant and her family if she were to return to Jamaica, these arguments were new, having not been raised in the Applicant's memorandum of fact and law and thus the Respondent was not afforded a fair opportunity to respond thereto. Such submissions are clearly improper and will not be entertained by the Court.

B. There Was No Breach of Procedural Fairness

[35] The Applicant assert that in rejecting the Applicant's affidavit evidence of her work as a front-line healthcare provider during the COVID-19 pandemic, the Officer made an adverse credibility finding against the Applicant, cloaked as an insufficiency determination, which credibility determination required that the Applicant be afforded an oral interview.

[36] In the H&C context, an applicant has no right or legitimate expectation that they will be interviewed [see *Owusu, supra* at para 8]. Exceptions to this rule have been made in some cases where an officer's decision is clearly based on a credibility finding [see *Duka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1071; *Shpati v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1046]. However, as noted above, I am not satisfied that the Officer made any credibility findings. Rather, the Officer's determination turned on the sufficiency of the evidence put forward by the Applicant. Accordingly, I find that there was no breach of procedural fairness by the Officer in not convoking an oral interview.

III. Conclusion

[37] As I have found that the Applicant has not demonstrated that the Officer's decision was unreasonable or that there was a breach of procedural fairness, the application for judicial review shall be dismissed.

[38] The parties have proposed no question for certification and I agree that none arises.

JUDGMENT in IMM-3279-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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