Federal Court  Cour fédérale

Date: 20220616

Docket: IMM-3376-20

Citation: 2022 FC 910

Ottawa, Ontario, June 16, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MAILA BAAO CEGUERRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the decision made on July 20, 2020, (the Decision) by a Senior Immigration Officer (the Officer), rejecting their application for permanent residence on humanitarian and compassionate (H&C) grounds, pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and, for refusing their alternative of an application for a Temporary Resident Permit (TRP).

[2] The Applicant's case rests on their submission that the Decision is unreasonable because the Officer erred in three ways. First, by failing to demonstrate compassion for the discrimination suffered by the Applicant in the Philippines, as a lesbian, and in Canada, as a victim of employment fraud. Second, by ignoring evidence concerning the operational inadequacy of state protection and the experience of LGBTQ+ people living in the Philippines. Third, by ignoring evidence and providing insufficient reasons in refusing the TRP request.

[3] For the reasons that follow, the application to set aside the H&C decision is granted and the application to set aside the TRP decision is denied.

II. **Background Facts**

[4] The Applicant is a citizen of the Philippines who identifies as an out lesbian. In an affidavit accompanying their H&C application, the Applicant described the many difficulties and discrimination they faced in the Philippines, particularly as an acknowledged lesbian seeking employment.

[5] In 2005 they started applying overseas, but still faced discrimination. Eventually the Applicant got a job in Taiwan in July 2008 but it ended unexpectedly after six months due to an economic crisis in Taiwan.

[6] The Applicant entered Canada from Taiwan as a temporary foreign worker on February 25, 2013.

[7] In January 2014, while their work permit was still valid, the Applicant hired an agency called LINK4STAFF (the Agency) in order to apply for a job with an employer who possessed a Labour Market Opinion (LMO). In order to send money to their ailing mother in the Philippines, the Applicant began to work at a mushroom farm without signing a contract.

[8] In March 2014, the Applicant signed a contract with the mushroom farm. They were not given a copy of the contract and assumed that the process for an LMO had been initiated.

[9] The Applicant made multiple inquiries to the Agency about the LMO. All they were told was that the LMO was approved on October 2014. It subsequently transpired that there was no LMO.

[10] On April 15, 2015, the Applicant was issued a work permit. They claim they were told by their employer, without any supporting documentation, that the work permit was issued following approval as a live-in caregiver. On February 5, 2017, the Applicant received a message in their online government account stating they were not a member of the Live-In Caregiver Program (LICP). As only the Agency could access the account the Applicant contacted them, multiple times, about the message. The Applicant never received any information from the Agency.

[11] On August 2, 2018, the Applicant applied for permanent residence on H&C grounds, which included involvement in their church and the migrant worker community. In Canada, the

Applicant is very involved in their church community and migrant worker community. They are an active member of Migrante Ontario since 2017.

[12] The Applicant also sought the issuance of a Temporary Resident Permit (TRP) with their H&C application. On July 20, 2020, the Decision denied both requests.

III. **Preliminary Issue**

[13] The Certified Tribunal Record (CTR) does not contain a July 10, 2020 update purportedly sent by the Applicant's previous representative. It is alleged that both the initial H&C package and the July 10th update were submitted before the Decision was rendered, 10 days later, on July 20, 2020. The Applicant argues it must be assumed that the update was received as there is no evidence that the update was received later.

[14] The Respondent states, and an affidavit supports, that the processing office has no record of the July 10th update. It was not before the Officer, nor - as indicated by it not being in the CTR - was it ever received at the processing office.

[15] No affidavit of service or proof of receipt by the Respondent was filed by the Applicant.

[16] The onus is on the Applicant to prove on a balance of probabilities that the update was received by the processing office. No such proof having been tendered, I conclude the July 10th update was not received and was not before the Officer for consideration. Accordingly, I will not

take into account the July 10th update materials found at pages 281-322 of the Application Record.

[17] Similarly, the TRP materials at pages 240 to 280 of the Application Record are not found in the CTR and will not be considered in this application.

[18] As a result of these documents not reaching the Processing Office, several of the Applicant's arguments are without an evidentiary foundation in the CTR and cannot be considered in this review.

IV. **Issues**

[19] The only issue is whether the Decision is reasonable.

[20] The Applicant submits that the Officer failed to show compassion when assessing their establishment in Canada.

[21] The Applicant also submits that the Officer ignored evidence and relied on speculation to conclude that the Applicant would not face hardship if returned to the Philippines.

[22] The Respondent submits the Applicant is merely asking the court to reweigh the evidence and there are no errors warranting the Court's intervention.

[23] The Applicant replies that the Respondent has not substantively replied to the issues they have raised.

V. **Standard of Review**

[24] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. It confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness, subject to certain exceptions which do not apply on these facts. The burden is on the party challenging the decision to show it is unreasonable: *Vavilov* at paras 23 and 100.

[25] A reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification offered for it. To set a decision aside, a reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov* at para 100.

[26] Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at paras 15 and 85.

VI. **The Decision under review**

[27] The Officer noted the basis for the H&C application was establishment in Canada, adverse country conditions in the Philippines, the action against the Applicant's former employment agency and providing financial support to the Applicant's mother.

[28] The Applicant's request for H&C relief was denied on the basis of insufficient evidence.

[29] I find that it is only necessary to discuss the Officer's treatment of the Applicant's establishment in Canada and the adverse country conditions in the Philippines.

[30] The TRP request was denied because there was little in the materials to indicate that the Applicant sought legal action against LINK4STAFF or, if they had, what the status of any action might be. That was a reasonable conclusion based on the documents in the CTR.

VII. **Analysis**

A. *Establishment*

[31] The Officer found that the Applicant had resided in Canada for seven years and it was a significant period of time. The Officer then noted that for the past several years the Applicant had been without status in Canada and had been unable to regularize their status.

[32] As the Applicant had one sister in Canada, while their mother and 9 other siblings either resided in the Philippines or in other countries, the Officer found that the H&C materials demonstrated the Applicant's familial ties to the Philippines were greater than their familial ties to Canada.

[33] The Officer noted the Applicant's employment from March to October 2013 and from January 2014 to August 2016, but also noted that they have been unemployed since August 2016 and their application for a further work permit was denied in December 2019.

[34] The Officer noted the Applicant's involvement in their community and as a member of Migrante Ontario, where they participated in and volunteered for various activities. The Officer also noted that the Applicant has close friends and acquaintances, several of whom wrote letters of support.

[35] The Officer repeated their findings with respect to the Applicant's family ties in Canada versus in the Philippines, that the Applicant worked for several years and was able to send money to their family in the Philippines and that they had been unemployed since August 2016, which was quite a lengthy period of time.

[36] In support of their H&C application, the Applicant provided an affidavit dated July 7, 2018. They attested to several instances of discrimination in the Philippines, based on being older and a lesbian, when they applied for jobs for which they were qualified. They also attested

to their financial and contractual mistreatment by the Agency who lied to them repeatedly about employment positions, their current job status and employment opportunities.

[37] The Officer stated the facts, sometimes twice, and drew a conclusion. There is no analysis to enable the Court to understand the Officer's reasoning process.

[38] The Officer concluded the establishment analysis by saying "[w]hile I have given positive consideration to these things, I do not find that they demonstrate a great deal of establishment in Canada."

[39] It is not possible to determine how or why the Officer arrived at that conclusion nor what was missing or would be required to show "a great deal of establishment in Canada." Once again, there are no reasons, just a conclusion that is not intelligible, transparent or justified, making the Decision unreasonable: *Vavilov* at para 100.

[40] The Officer refers to the Applicant's lack of immigration status several times. This is not a reasonable approach, as stated by Mr. Justice Grammond in *Lopez v Canada (Citizenship and Immigration)*, 2019 FC 349 at paragraph 11:

> . . . the power to grant an H&C exemption is intended to "mitigate the rigidity of the law." Exercising this power necessarily implies, from the outset, that the situation does not comply with the Act. Therefore, without falling into circular reasoning, illegality or non-compliance with the Act cannot be invoked as an obstacle to the granting of H&C relief.

B. *Adverse Country Conditions*

[41] The Officer identified the relevant adverse country conditions in the Philippines as including a high rate of unemployment, discrimination against LGBTQ+ individuals, and corruption and impunity in the criminal justice system.

C. *Unemployment rate*

[42] The Officer noted the Applicant was born and raised in the Philippines, resided there for many years, completed high school and obtained a post-secondary diploma in Electronic Computer Technology. The Officer determined that the Applicant's familiarity with the Philippines and their education would greatly assist the Applicant to obtain employment in the Philippines. The Officer also noted the Applicant had been able to find employment in Canada and previously in Taiwan and found that those experiences would "greatly assist" the Applicant to obtain employment in the Philippines.

[43] That finding runs contrary to the Officer's subsequent statements regarding conditions for LGBTQ+ individuals in the Philippines. The Officer noted the Applicant had previously experienced discrimination in the Philippines for many years because they are a lesbian and that they were unable to obtain employment there as result of that discrimination.

[44] The Officer did not explain how the Applicant, as an older person now, and still an out lesbian, would be assisted by familiarity with the Philippines' and their education, both of which they possessed previously when jobs for which they were qualified were unattainable. The only

thing that has changed is that the Applicant is now older and correspondingly less employable than before.

[45] The Officer stated that if the Applicant could not obtain employment on returning to the Philippines, the H&C materials had little to indicate they would not be able to work overseas again as they had done previously.

[46] The Officer misstated the burden borne by the Applicant. They were not required to show that they could not work in Taiwan. Whether the Applicant might be able to find work in the Philippines was the issue before the Officer. “Overseas” is not the Philippines, which will be the country of removal for the Applicant.

[47] Finding that the Applicant might be able to work “overseas”, if not able to work in the Philippines, is irrelevant to the H&C analysis. From the conclusion though, it appears to have been important in determining that the Applicant had not shown there were adverse employment conditions in the Philippines:

> In the event that the applicant was unable to obtain employment upon her return to the Philippines, I note that there is little in the applicant’s H&C materials to indicate that the applicant would be unable to once again apply to work overseas as she has successfully done previously.

[48] I find the Officer’s comments about adverse country conditions are based on speculation and consideration of irrelevant factors such as employment in Taiwan. Based on the facts that were before the Officer, the Officer’s reasoning is both incoherent and irrational.

D. *Treatment of LGBTQ+ individuals*

[49] The Officer acknowledged that several research reports indicated discrimination against LGBTQ+ individuals in the areas of employment, education, healthcare, housing and social services is an ongoing issue in the Philippines.

[50] The Officer found the same reports indicated that the majority of the population in the Philippines accept LGBTQ+ individuals and that anti-discrimination legislation had recently been implemented in many municipalities and provinces in the Philippines.

[51] The Officer concluded that while the Applicant might experience some discrimination, as a result of their sexual orientation, they did not find that the Applicant's H&C materials demonstrated that the laws in the Philippines would not provide the Applicant the means to address that issue.

[52] I agree with the Applicant that the Officer relied on the existence of the laws as remedies should the Applicant be a victim of discrimination, but ignored evidence in the US DOS 2017 Country Report on Human Rights Practices in the Philippines that the laws were not implemented. For example, the report noted with respect to employment discrimination that the laws did not prohibit employment discrimination with respect to sexual orientation, gender identity and age as well as a variety of other personal characteristics not present in this application. Local ordinances against discrimination on the basis of sexual orientation and gender identity were said to apply to only 15% of the Filipino population.

[53] Another document dealing with bullying of LGBT children at school indicates that as part of a Child Protection Policy an Anti-Bullying Law passed in 2013, implemented rules and regulations that sexual orientation and gender identity are prohibited grounds for bullying and harassment. The same document however found that while the policies were strong on paper, they have not been adequately enforced.

[54] If a decision maker refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the decision maker overlooked the contradictory evidence when making its finding of fact. When the non-mentioned evidence is critical and contradicts the evidence relied on in the decision then the reviewing court may infer that the decision maker made an erroneous finding of fact without regard to the evidence before it: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35 at paras 14-17. In that event, which is what occurred in this instance, the Decision is unreasonable.

VIII. **Conclusion**

[55] The Decision is a set of factual statements, summaries of arguments and peremptory conclusions made without any clear weighing or analysis. The reasons do not help the Court to understand the rationale underlying the decision. Nor does review of the underlying record provide any assistance in that respect, as the reasons do not engage with much of the evidence in the record.

[56] Reasons that simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion, as is the case here, will rarely assist a reviewing court to understand the rationale underlying a decision. They are no substitute for statements of fact, analysis, inference and judgment**:** *Vavilov* at para 102.

[57] Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 25. The Officer's reasons do not show that this was done, particularly in light of the extensive affidavit evidence of the Applicant and documentation that is not addressed in the Decision.

[58] For all the foregoing reasons, I find the decision to deny the H&C application is unreasonable and must be set aside. It will be returned for a redetermination by a different Officer.

[59] As previously stated, I find the Officer reasonably denied the TRP request based on the evidence in the CTR.

[60] No question was suggested for certification and I find that none exists on these facts.

JUDGMENT in IMM-3376-20

THIS COURT'S JUDGMENT is that:

1. The application to set aside the H&C decision is granted and the matter is returned for redetermination by another Officer.

2. The application to set aside the TRP decision is denied.

3. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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