Federal Court Cour fédérale

Date: 20220729

Docket: IMM-2509-21

Citation: 2022 FC 1146

Ottawa, Ontario, July 29, 2022

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

MARVA SHIRLEY MAXINE TOUSSAINT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Marva Shirley Maxine Toussaint, seeks judicial review of the decision rendered on April 9, 2021, by a Senior Immigration Officer [Officer], refusing her application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, I conclude that the application should be granted.

II. Background Facts

[3] The Applicant was born in St. Vincent and the Grenadines [St. Vincent] and is currently 48 years old.

[4] She arrived in Canada on June 5, 1995, and has resided here without status for over 26 years.

[5] Since her arrival in Canada, the Applicant has worked without a work permit as a housekeeper and nanny. This source of income allowed her to provide financial assistance to family members in St. Vincent. She never relied on social assistance and has no criminal record in Canada or elsewhere.

[6] In 2011, the Applicant submitted her first application for permanent residence from within Canada on H&C grounds. Her application was refused on October 27, 2011. Details of the Applicant's first application and the reasons for refusal are not mentioned by the Officer in the impugned decision and are not reproduced anywhere in the record before me.

[7] After her H&C application was refused, the Applicant was required to depart Canada. However, she remained here and continued to work without a work visa.

[8] In July 2020, the Applicant applied a second time for permanent residence from within Canada on H&C grounds. In her application, the Applicant acknowledged that she was ineligible for permanent residence as she did not meet the criteria of any economic permanent residency programs, and because she had overstayed and worked illegally in Canada. She requested that any legal requirements to obtain permanent residence be waived based on various factors, including her establishment and ties to Canada. Once again, her application was refused.

III. Decision under Review

[9] The Officer reviewed the Applicant's evidence and submissions and concluded that although the Applicant did establish herself during the 26 years, she lived illegally in Canada and her establishment was not exceptional. Moreover, she did not provide evidence that her prolonged stay in Canada was the result of circumstances beyond her control.

[10] The Officer also found that the Applicant's actions in engaging employment without authorization showed disregard for immigration laws. Furthermore, the Applicant continued to reside in Canada without attempting to regularize her status.

[11] The Officer considered the other factors advanced by the Applicant but found that the Applicant did not show how the weak economy, level of healthcare or gender-based violence in St. Vincent related to her personal circumstances.

[12] Based on an overall assessment of the H&C factors advanced by the Applicant, the Officer was not satisfied that she had provided sufficient evidence to establish that a positive exemption was warranted on H&C grounds.

IV. Analysis

[13] H&C decisions are discretionary decisions. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*], the Supreme Court of Canada confirmed that reasonableness is the applicable standard of review for discretionary decisions and is the presumptive standard of review for other decisions.

[14] The court begins by examining the reasons for the decision with respectful attention, seeking to understand the reasoning process followed by the decision maker to arrive at a conclusion. 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 paras 85, 102, 105-110).

[15] The Applicant submits that the Officer committed a number of errors of law and errors of fact and law in the analysis of the Applicant's application. While I do not agree with all of the arguments raised by the Applicant, I find the Officer's analysis of the Applicant's establishment in Canada to be both flawed and unreasonable.

[16] In considering the Applicant's establishment in Canada, the Officer noted that the Applicant has resided in Canada for approximately 26 years, that she has developed strong

relationships and that she was employed as a housekeeper. The Officer gave “some consideration” to the Applicant’s establishment in Canada, but found that it was not exceptional.

[17] The Officer went on to focus on the fact that the Applicant was without lawful status for a significant period of time and that she engaged in employment without authorization. The Officer found that the Applicant’s actions showed a disregard for immigration laws in Canada and did not weigh in her favour. The Officer also found the fact that the Applicant continued to reside in Canada without attempting to regularize her status did not weigh in her favour. For these reasons, the Officer gave negative weight to the circumstances surrounding the Applicant’s establishment.

[18] In my view, the Officer’s analysis of the establishment factor is problematic for three reasons.

[19] First, the Officer failed to give proper weight to the substantial period of time the Applicant has resided in Canada. It is difficult to understand how the Officer could conclude that a quarter century in Canada is not exceptional. In *Trach v Canada (Citizenship and Immigration)* 2015 FC 282 [*Trach*], Mr. Justice Keith Boswell found that 13 years, which is half the period of time in the present case, was “clearly significant, if not exceptional,” and that it was unreasonable for the officer to discount it in the manner she did by finding it “not uncommon.”

[20] I was faced with similar facts in *Small v Canada (Citizenship and Immigration)* 2021 FC 930. In that case, the applicant came to Canada at age 26 and had resided in Canada for

approximately 21 years when she applied for permanent residence based on H&C grounds. I concluded that the officer had erred in their assessment of the Applicant's establishment in Canada, and found the analysis to be wanting for the following reason:

> [37] Despite evidence that the Applicant has spent twenty-one (21) years in Canada, her history of stable employment, her financial independence, her close family ties to her Canadian family, her deep involvement in the community and her apparent good civil record in Canada, the Officer could only muster a tepid finding that the Applicant has 'a degree of establishment' and that 'some weight' should be assigned to this factor.

[21] The Officer's finding that negative weight should be given to the circumstances surrounding the Applicant's establishment suffers from the same lack of justification.

[22] Second, the Officer unreasonably focussed and placed undue weight on the Applicant's disregard for immigration laws. While 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, they were required to balance the need to respect Canada's immigration laws with the fact that H&C applications typically involve applicants who have failed to comply with the law.

[23] 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. In my view, it was contrary to this need for balancing and therefore unreasonable for the Officer to conflate and repeatedly discount positive H&C factors related to the Applicant's establishment because of non-compliance.Third, the Officer criticizes the Applicant for continuing to reside in Canada without attempting to

regularize her status. However, the Applicant did in fact attempt to regularize her status in Canada when she applied for permanent residency in 2011. I am not satisfied that this error of fact had no impact on the assessment of the application and that, were it not for this error, the Officer's decision would have been the same.

[24] In summary, I am not persuaded that the Officer's Decision bears the hallmarks of reasonableness—justification, transparency and intelligibility. Given my findings on the Officer's assessment of the establishment factor, I need not address the other issues raised by the Applicant.

[25] I wish to add that my decision should not be interpreted as condoning the actions of the Applicant in flouting the immigration laws.

V. Conclusion

[26] The application for judicial review is granted, and the matter shall be returned to be reconsidered by a different immigration officer. There is no question for certification.

JUDGMENT IN IMM-2509-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated April 9, 2021, is set aside.
3. The matter is returned for redetermination by a different immigration officer.
4. No question of general importance is certified.
5. The style of cause is amended to remove the Respondent, the Attorney General of Canada with immediate effect.

"Roger R. Lafreniere"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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