Federal Court Cour fédérale

Date: 20230208

Docket: IMM-561-22

Citation: 2023 FC 185

Ottawa, Ontario, February 8, 2023

PRESENT: Madam Justice Walker

BETWEEN:

BRITTANY KATHLEEN GRAHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Brittany Graham, seeks judicial review of the decision of a senior immigration officer dated January 4, 2022, refusing her application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

[2] For the reasons set out below, I am persuaded that the officer's decision is not reasonable and will allow this application.

I. Background

[3] The Applicant arrived in Canada as a visitor on July 18, 2015. She is a citizen of both Jamaica and Antigua and Barbuda. The Applicant lived in Antigua and Barbuda for most of her life before coming to Canada. She was 24 years old at the date of the officer's decision.

[4] Following her arrival in Canada, the Applicant endured a relationship with KM that was marred by domestic abuse. The couple's son, AG, was born on January 1, 2018 and is a Canadian citizen. KM was eventually deported to Antigua and Barbuda, where he and his family continue to reside.

[5] On March 23, 2018, the Applicant's mother and stepfather applied to sponsor her for permanent residence in Canada under the Family Class program but the application was deemed incomplete and refused.

[6] The Applicant submitted her H&C application on January 30, 2020, citing establishment in Canada, the best interests of her child (BIOC), and adverse country conditions in Jamaica and in Antigua and Barbuda, in part due to the presence of KM in the latter country. The Applicant also raised her mother's serious medical conditions and explained the daily care and comfort she provides to her mother.

[7] As stated above, the officer refused the H&C application and the Applicant now seeks the Court's review of the refusal decision.

II. Analysis

[8] The officer assessed each of the factors the Applicant identified in her H&C application and placed significant positive weight on AG's best interests and the hardship her mother would most likely experience should the Applicant be required to leave Canada. The officer weighed these two factors against their assessment of establishment and adverse country conditions, and concluded that the Applicant's circumstances did not justify an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) based on H&C considerations.

[9] The Applicant submits that there are four significant and determinative errors in the H&C decision that render it unintelligible and unreasonable. She argues that: (1) the officer assessed each factor through a hardship lens contrary to the jurisprudence of the Supreme Court of Canada (SCC) (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 (*Kanthasamy*)); (2) the officer erred in assessing her establishment in Canada, in part by placing disproportionate weight on her failure to comply with Canadian immigration laws; (3) the BIOC analysis is fundamentally flawed: and (4) the officer failed to reasonably consider the risks to the Applicant and AG posed by KM and his family in Antigua and Barbuda.

[10] I agree with the Applicant that the officer's analysis of her establishment in Canada and the adverse risks she may encounter in Antigua and Barbuda is significantly flawed. The H&C decision does not withstand the Court's consideration against either the analytical framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*) or the jurisprudence of the SCC and this Court

establishing the principles of analysis required of H&C decision-makers and their decisions (beginning with *Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338).

[11] The officer's review of the Applicant's establishment suffers from two errors. First, I agree with the Applicant that the officer unreasonably commingled their consideration of her establishment in Canada with elements of a hardship assessment.

[12] The officer found that the Applicant's meaningful friendships in Canada, her membership in a congregation and volunteer work were positive factors but mitigated the importance of the friendships by observing that any "emotional hardship" will be lessened by the ability to keep in touch electronically.

[13] The officer then assessed the Applicant's employment history in Canada and reasonably noted the absence of any evidence corroborating the Applicant's statement that she had worked most of the time she had been in Canada (e.g. lack of employment records, employment letters or statements of earnings). The officer concluded that the Applicant had provided little evidence demonstrating financial self-sufficiency in Canada. There is no reviewable error in the officer's assessment of her employment to this point. However, the officer also concluded that the Applicant's jobs in Canada were not unique to Canada with the result that she could find similar employment in Jamaica or Antigua and Barbuda. This statement led the officer to a partial hardship analysis as part of their establishment analysis, separate from a more general hardship section later in the decision.

[14] I find that the officer conflated establishment with hardship. Establishment in Canada should be assessed as its own category. Positive aspects of an applicant's establishment must not be diminished by the possibility of mitigation (*Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at para 53). The officer did so in the present case by diminishing the importance of the Applicant's establishment in Canada with reference to the possibility of maintaining her Canadian connections electronically. A further example of commingling is the officer's use of the Applicant's establishment to reduce hardship in Jamaica or Antigua and Barbuda, again without a distinct or stand-alone assessment of that establishment (*Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at paras 25-28). The officer should have considered the Applicant's evidence of friendships, employment and volunteer work in Canada and determined whether establishment was a positive factor without importing elements of their hardship analysis. They did not do so, thereby compromising the intelligibility and justification of their ultimate conclusion.

[15] Second, the officer placed significant negative weight on the fact that the Applicant overstayed her visa and was employed in Canada for over three years without a valid work permit. They noted that the Applicant provided no reason why she was prevented from leaving Canada at the end of her authorized stay and no evidence of any attempt to apply for and obtain a valid work permit. The officer concluded that the Applicant chose to disregard Canadian immigration laws.

[16] The officer's analysis is similar in this respect to the reasoning in *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 (*Mitchell*). There, the officer discounted the

applicant's Canadian employment history due to lack of documentation and then stated that any work done in Canada would have been without authorization. In *Mitchell* (at para 27), I found that the officer's analysis was unreasonable: "If the Officer cannot give the Applicant's alleged work history any weight because it has not been established, it is unreasonable for her to then ascribe negative weight to any work he may have undertaken". I make the same finding in the present case.

[17] Further, the officer relies on the fact that the Applicant does not appear to have applied for or tried to obtain a valid work permit and simply remained in Canada without valid authorization for a lengthy period of time. The officer fails to acknowledge the application for permanent residence made by her mother and stepfather on the Applicant's behalf in 2018. By then, she had not only begun her relationship with KM but had given birth to AG. From that period onwards, it became more difficult for the Applicant to return to Antigua and Barbuda because she not only had an infant son but also was experiencing abuse from her ex-partner. I find that the officer failed to take these considerations into account in their assessment of the Applicant's non-compliance with the *IRPA*.

[18] In summary, I conclude that the officer committed reviewable errors in commingling establishment and hardship and in their analysis of the Applicant's failure to respect Canadian immigration laws. With respect to commingling, the error does not lie in the form or structure of the decision but in the effect of the commingling on the officer's substantive consideration of the distinct factors of establishment and hardship and on the intelligibility of the decision as a whole.

[19] Turning to the issue of hardship and the Applicant's possible return to Antigua and Barbuda, the officer acknowledged that she is most likely a victim of domestic abuse by KM and that she has been harassed and threatened by his family members. However, the officer stated that she provided no evidence as to when the abuse occurred or how long it lasted, or when the harassment from his family began and whether it was ongoing. The officer found little information to indicate that KM or the family will continue to mistreat her should she return to Antigua and Barbuda.

[20] The officer's analysis does not reflect the evidence. In her affidavit in support of the H&C application, the Applicant stated:

> My son's father's parents and I are not on good terms either, they send me text messages all the time saying that they are going to beat me and kill me if I keep asking him for support payments. He has sent them to pressure me to stop asking for support. His sister, father and mother leave voicemails threatening me if I don't leave their son alone.

[21] The language used by the Applicant strongly suggests that KM's family continues to threaten and harass her. She describes the harassment using the present tense and the officer fails to explain why they question the currency of the harassment. The argument that the Applicant will not risk threats and abuse if she simply stops asking for support payments is not persuasive.

[22] The officer also states that there is little evidence the Applicant will be unable to access and obtain state protection from KM and his family in Antigua and Barbuda. The officer fails to provide any support for their conclusion, despite the Applicant's submission that the police in Antigua and Barbuda do not take violence against women seriously and her reliance on objective

evidence indicating that “[v]iolence against women, including spousal abuse, continued to be a serious problem,” and “according to a local NGO representative, police failed to carry out their obligations on domestic violence under the law”.

[23] I conclude that the officer’s analysis of the hardship and risk the Applicant may encounter should she return to Antigua and Barbuda, by far a more likely destination than Jamaica, does not reasonably engage with the Applicant’s evidence. As a result, the officer’s justification for their conclusion that the Applicant will not endure significant hardship upon her return to the country is materially undermined (*Vavilov* at para 85-86).

III. Conclusion

[24] The officer’s errors in assessing establishment and hardship necessitate the Court’s intervention. As a result, I will allow the application and return the Applicant’s matter for redetermination.

[25] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-561-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the senior immigration officer dated January 4, 2022 refusing the Applicant's application for permanent residence based on humanitarian and compassionate grounds is set aside and the matter is remitted to a different officer for redetermination.

3. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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