Federal Court Cour fédérale

Date: 20240328

Docket: IMM-12393-22

Citation: 2024 FC 495

Ottawa, Ontario, March 28, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

ADRIANA GOMES DE OLIVEIRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Adriana Gomes de Oliveira, is a Brazilian citizen who came to Canada on a study permit and later obtained a work permit. She entered a relationship and started living with her common law partner. The Applicant applied for permanent residence under the spouse or common law partner in Canada class. When the relationship broke down, she requested that

the application proceed instead on humanitarian and compassionate [H&C] grounds. See Annex "A" below for applicable legislative provisions.

[2] A senior immigration officer [Officer] refused the H&C application, citing insufficient establishment and insufficient evidence of asserted domestic violence [Decision]. The Applicant brings this application for judicial review challenging the Decision and seeking to have it set aside, with the matter sent back for redetermination by a different officer.

[3] There is no dispute that the presumptive review standard of reasonableness applies to the Court's consideration of this matter: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25. The sole issue is the reasonableness of the Decision. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, above at para 100.

[4] I am persuaded that the Applicant has met her onus. The determinative issue is the Officer's failure to consider the Applicant's assertion of domestic violence compassionately. For the reasons that follow, the Decision will be set aside, as requested by the Applicant, and the matter will be remitted to a different officer for redetermination.

II. Analysis

[5] I find that the Officer's treatment of the Applicant's evidence regarding her relationship with her ex-partner, the breakdown of the relationship and the asserted domestic violence that occurred during the process was unreasonable.

[6] To avoid judicial intervention, the challenged decision must bear the hallmarks of reasonableness—justification, transparency and intelligibility; a decision may be unreasonable if the decision maker misapprehended the evidence before it: *Vavilov*, above paras 99, 125-126.

[7] Further, the applicable test under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 mandates an H&C officer to consider whether an applicant's circumstances, viewed holistically, would "excite in a reasonable person in a civilized community a desire to relieve [their] misfortunes" such that relief is justified: *Cezair v Canada (Citizenship and Immigration)*, 2019 FC 1510 at para 16, citing *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 13. *Kanthasamy*, in turn, cites the administrative decision in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, from which the above quote derives.

[8] In assessing whether an exemption to Canada's immigration scheme is warranted under subsection 25(1), officers must consider *all* relevant H&C considerations before them; what warrants relief will vary depending on the applicable facts and context: *Kanthasamy*, above at para 25.

[9] With the above principles in mind, I am convinced that the Officer's reasoning is flawed in several respects, warranting the Court's intervention.

[10] For example, the Officer accepts, based on the Applicant's statement, that the Applicant may have witnessed her ex-partner's drug use, that the relationship broke down and that the Applicant suffered anxiety.

[11] In contrast, the Officer is not prepared to accept other asserted facts, requiring corroboration of the violence the Applicant experienced, the therapy sessions she attended, financial demands the ex-partner made, any payment the Applicant made to him and any intervention by law enforcement or other appropriate authorities. Further, the Officer is silent about the asserted ex-partner's threat to withdraw sponsorship.

[12] While it is open to an officer to accept some evidence over other evidence, they must explain why they have done so: *Kumarakulasooriyan v Canada (Citizenship and Immigration)*, 2022 FC 1055 at para 23; *Amarasingam v Canada (Citizenship and Immigration)*, 2023 FC 655 at para 42; *Wray-Hunt v Canada (Citizenship and Immigration)*, 2023 FC 1687 at para 10.

[13] I agree with the Applicant that the Officer's concerns about the lack of corroborative evidence demonstrates a lack of awareness of the guidance of Immigration, Refugees and Citizenship Canada [IRCC] on domestic violence, including the "program delivery instructions" [PDI]. That the PDI, like the IRB's Gender Guidelines, may be directed to refugee protection claims, as argued by the Respondent, makes it no less relevant, in my view, to the Applicant's circumstances. Unlike the IRB's Gender Guidelines, however, the PDI is directed to permanent residency applications specifically, which, in my view, makes it relevant to the Applicant's circumstances.

[14] For example, the Officer's reference to a lack of evidence of any intervention by law enforcement or other appropriate authorities is indicative, in my view, of a lack of sensitivity to domestic violence situations that may not involve physical abuse, but rather financial and psychological abuse—as asserted by the Applicant—or situations that may not be reported, especially where there is an assertion of threatened removal of sponsorship or deportation that directly impacts an applicant's status in Canada.

[15] In addition, the Officer does not grapple with the PDI's guidance that there may be little evidence available to substantiate domestic abuse. While the PDI is not binding on the Officer, it nonetheless provides a measure for the Court to consider in assessing the reasonableness of the Officer's reasoning: *Kanthasamy*, above at para 32; *Matthias v Canada (Citizenship and Immigration)*, 2014 FC 1053 at para 32, citing *Frank v Canada (Citizenship and Immigration)*, 2010 FC 270 at paras 20-21.

[16] In the circumstances, I find that the Officer's discounting of the Applicant's evidence of domestic violence because of a lack of corroborating evidence is unreasonable, in that the reasons are not transparent and, in my view, this gives rise to a veiled credibility concern.

III. Conclusion

[17] For the above reasons, I will grant the Applicant's judicial review application. The Decision will be set aside, with the matter sent back for redetermination by a different officer.

[18] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-12393-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The November 23, 2022 decision of the senior immigration officer refusing the Applicant's application for permanent residence on humanitarian and compassionate grounds is set aside.
3. The matter will be remitted to a different officer for redetermination.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27.**

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, 35.1 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, 35.1 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, 35.1 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, 35.1 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.

FEDERAL COURT

SOLICITORS OF RECORD

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