Federal Court  Cour fédérale

Date: 20240403

Docket: IMM-7116-22

Citation: 2024 FC 514

Montréal, Québec, April 3, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

LAXIA ALEXIA PANTON

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision dated July 12, 2022, a reconsideration of her application for permanent residence on humanitarian and compassionate [H&C] grounds [Decision]. An initial decision dated June 15, 2022 denied her H&C application, but the matter was reopened to reflect the Applicant's other family members' immigration status in Canada. On reconsideration, the officer found that the Applicant did not have sufficient grounds to warrant

an H&C exemption under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant submits that the officer erred in failing to properly assess her establishment, the best interests of her son, and hardship in Jamaica and failing to engage with relevant evidence.

[3] The Respondent argues that the Decision is reasonable and that the Applicant's case amounts to a disagreement of the weight assessed by the officer, and asking the Court to reweigh the evidence.

[4] For the reasons that follow, this application for judicial review is dismissed. Based on the evidentiary record, the parties' written and oral submissions, and the applicable law, the Applicant has not demonstrated that the Decision was unreasonable.

II. Background

A. *Facts*

[5] The Applicant is a citizen of Jamaica who entered Canada as a visitor in May 2018, and has remained in Canada since then.

[6] In Jamaica, the Applicant had worked successfully as a recording artist, allowing her to open two bars. She left Jamaica after her place of business had been robbed three times. Shortly

after the third robbery, the Applicant decided to visit her family in Canada. The Applicant reunited with her mother, half-siblings, aunt, and cousin who are permanent residents or Canadian citizens.

[7] The Applicant was pregnant when she arrived in Canada, and gave birth to her son in Canada in October 2018. While in Canada, the Applicant was informed that her home in Jamaica had also been robbed. She decided to stay in Canada at this point. The Applicant returned to school and began working, eventually starting her own business with a line of hair products.

[8] The Applicant submitted an H&C application on October 7, 2021 which was denied on June 15, 2022. She requested a reconsideration of the June 15, 2022 decision on the basis that the initial refusal erroneously stated that the Applicant's relatives either have no status or have work permits when, in fact, they had their own successful H&C applications.

[9] The officer considered the Applicant's request and re-opened the file for reconsideration on July 12, 2022. The Decision under review is the denial of the Applicant's H&C application after the officer's reconsideration.

B. *Decision Under Review*

[10] The officer reviewed the submissions and evidence with respect to establishment, recognizing the Applicant's efforts made to integrate into the community, starting a business, being financially self-sufficient, and having family members in Canada. The Applicant's family

ties were given “some weight in this decision.” The officer also noted that the family reunification factor “does not surpass all other considerations.”

[11] The officer noted that the Applicant had been working in Canada since her arrival despite having no legal authorization to do so. They also found that three years was not a substantial amount of time to be in a country, and there was insufficient evidence to demonstrate that the Applicant’s “level of interdependence with her family members in Canada is such that it would be detrimental for the applicant or her family here.” After canvassing these issues, the officer found the Applicant’s degree of establishment to be modest, and drew a negative inference from the Applicant’s failure to comply with Canada’s immigration laws.

[12] The officer recognized that elements related to hardship must also be examined which could include adverse country conditions that have a direct negative impact on the Applicant. Accepting the Applicant’s evidence that Jamaica’s conditions “are not ideal,” the officer noted the Applicant had submitted little objective evidence with respect to the robberies that the Applicant had claimed. There was no information on the dates or circumstances of the robberies, nor was there any mention of the Applicant going to the police or records from the police about these incidents. In totality, the officer found they had insufficient evidence or information regarding hardship associated with adverse country conditions to give this factor any weight.

[13] When assessing the best interests of the child [BIOC], the officer noted that the Applicant son’s birth certificate, the Applicant’s affidavit and supporting letters. There was no information to suggest the other parent is involved in the child’s life. The family members’ statements

outlined that the family supported the Applicant when her son was born, and that her son would often communicate with their cousins by video call. Recognizing the support network the Applicant has for her child in Canada and giving it "some weight," the officer concluded there was insufficient evidence to find that the BIOC would be compromised if their familial relationships were continued from abroad. There was also insufficient evidence to conclude the child's needs would not be met if he returned to Jamaica with the Applicant. There was also insufficient evidence to conclude that the child would be specifically at risk of violence or crime in Jamaica.

[14] Weighing their assessments of establishment, adverse country conditions, and the BIOC, the officer found that the positive weight accorded to the BIOC was not enough to justify an H&C exemption. They determined any hardship the Applicant would face in relocating to Jamaica would "arise from the normal and foreseeable working of the law." In summary, the officer determined the Applicant failed to meet their "onus of demonstrating, having regard to all of the circumstances that decent, fair-minded Canadians aware of the nature of H&C relief would find it simply unacceptable to deny the relief sought."

III. Issues and Standard of Review

[15] The issue in this application for judicial review is whether the Decision is reasonable.

[16] The parties agree that the applicable standard of review for with respect to the merits of the H&C Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23; *Kanthasamy v Canada (Citizenship and*

Immigration), 2015 SCC 61 [*Kanthasamy*] at para 44). I also agree that this is the standard of review to apply in this matter.

[17] The reasonableness standard of review finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers (*Vavilov* at para 13).

[18] A reviewing court applying the reasonableness standard must focus on the decision actually made, including the reasoning process and the outcome. It does not ask what decision it would have made instead, does not attempt to ascertain the "range" of possible conclusions, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem (*Vavilov* at para 83).

[19] The decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125).

[20] A reasonable decision is one 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. The reasonableness standard requires that a reviewing court defer to such a decision (*Vavilov* at para 85). Reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102).

[21] A reviewing court "must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside" (*Vavilov* at para 91). Moreover, "even where elements of the analysis are left out and, in the whole scheme of the things, the decision is not undermined as a whole and must stand" (*Vavilov* at para 122).

[22] The burden of proof lies with the party claiming that the decision is unreasonable. The party must prove to the reviewing court that the decision is so seriously flawed that it cannot be said to meet the requirements of justification, intelligibility and transparency (*Vavilov* at para 100).

IV. Applicable Law in H&C Applications

[23] Section 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of the *IRPA* if the Minister is of the opinion that such relief is justified by humanitarian and compassionate reasons, taking into account the best interests of a child directly affected.

[24] In considering an H&C application, the officer must consider whether the facts, established by the evidence, would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes "'warrant the granting of special relief'" from the effect of the provisions of the *IRPA*. The purpose of the

H&C provision is to provide equitable relief in those circumstances (*Kanthasamy* at paras 13 and 21).

[25] The onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45). Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at para 18).

[26] In assessing whether an applicant has established sufficient H&C considerations to warrant a favourable exercise of discretion, all of the relevant facts and factors advanced by the applicant must be considered and weighed (*Kanthasamy* at para 25). The words “unusual and undeserved or disproportionate hardship” should be seen as instructive, but not determinative (*Kanthasamy* at para 33).

[27] Assessing the BIOC is highly contextual, and the guidance in *Kanthasamy* describes the application of this assessment to be responsive to each child’s particular age, capacity, needs, maturity, and level of development. The officer must determine what appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. When legislation such as subsection 25(1) of the *IRPA* specifies that the BIOC who is “directly affected” be considered, those interests are a singularly significant focus and perspective (*Kanthasamy* at paras 35-36, 40).

[28] The Supreme Court in *Kanthasamy* cited its decision in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699, [1992] 2 SCR 817 [*Baker*] where the "best interests" principle was identified as an important part of the evaluation of H&C grounds that the decision maker should give this factor substantial weight, and to be alert, alive and sensitive to it. It does not mean that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim. However, a decision under subsection 25(1) of the *IRPA* will be unreasonable if the interests of children affected by the decision are not sufficiently considered (*Kanthasamy* at paras 38 to 39).

[29] The decision maker must do more than simply state that the interests of a child have been taken into account. Those interests must be well identified, defined, and examined with a great deal of attention in light of all the evidence (*Kanthasamy* at para 39).

V. Analysis

[30] I will address the H&C's Decision.

A. *Establishment*

[31] The Applicant argues that the officer improperly penalized her for overstay and unauthorized work history in Canada without balancing these issues against the purpose of an H&C application. It is the Applicant's position that the officer used it to "gut the entire application" and used her non-compliance with Canada's immigration laws as a "double punishment." While the Applicant accepts that the officer was entitled to consider non-

compliance in the context of establishment, the Applicant argues that the officer penalized her throughout her application, which is an error.

[32] In support of this argument, the Applicant referred me to the section in the establishment analysis where the officer stated, “her actions demonstrate a clear disregard of Canada’s immigration program from which she requests a regulatory waiver. In my view, this factor significantly minimizes other positive considerations presented in this application.” This sentence, in the Applicant’s view, demonstrated that the officer vitiated all positive factors in the H&C application.

[33] The Applicant points to a passage from Justice Walker (then of this Court), noting that Parliament’s creation of the H&C exemption “presupposes that an applicant has failed to comply with one or more of the provisions of the *IRPA*. Therefore, a decision-maker must assess the nature of the non-compliance and its relevance and weight against the applicant’s H&C factors in each case” (*Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23).

[34] The Respondent points out that the Applicant’s illegal work activity was only mentioned in the “Establishment” section of the analysis, and there is no evidence to suggest their negative immigration history outweighed all other H&C factors.

[35] With respect, I cannot read the decision in the narrow way that the Applicant suggests. Reasons should be read holistically and contextually to understand the basis on which a decision

was made (*Vavilov* at para 97). The Court cannot consider the Decision with only one cited phrase or word in isolation from the rest of the Decision.

[36] The Applicant's H&C application was focused on the following grounds: "the Applicant's establishment in Canada; hardship of return to Jamaica; and, the best interests of the Applicant's child."

[37] On reviewing the Decision as a whole, there is no indication that the officer considered the Applicant's overstay and unauthorized employment beyond the context of the establishment analysis. There are no references to the Applicant's non-compliance with immigration laws to the officer's assessment of the BIOC and hardship. The officer considered the letters and other evidence submitted by the Applicant, assessed her family ties, time in Canada, and unauthorized employment, and found that the Applicant had a modest degree of establishment that was attenuated by the fact the Applicant cannot benefit from establishing themselves illegally. As such, I cannot find that the officer improperly assessed the establishment factor, or doubly penalized the Applicant's non-compliance under the other two factors as has been alleged. Finally, the facts of this case are distinguishable from the cases that the Applicant has cited in support of this argument.

[38] The integrity of the Canadian immigration system, and an applicant's compliance with it, is a relevant consideration in an H&C application (*Legault v Canada (Citizenship and Immigration)*, 2002 FCA 125 [*Legault*] at para 19; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 [*Shackleford*] at paras 23-25). It is not unreasonable for the officer

to negatively weigh the applicant's establishment as it was entered into without authorization (*Shackleford* at para 24, citing *Edo-Osagie v Canada (Minister of Citizenship and Immigration*), 2017 FC 1084 at para 17).

[39] I cannot find that the officer placed undue focus or improperly assessed the nature of the Applicant's non-compliance and its relevance and weight against the other factors for establishment, or that it was used to minimize the rest of her application.

[40] The Applicant also argues that her support letters to support establishment were ignored by the officer. The officer had found that there was insufficient evidence to demonstrate that the level of interdependence with her family members in Canada is such that it would be detrimental for the Applicant or her family here. On a review of the objective evidentiary record before the officer, the letters attested to the Applicant's work ethic and her good character, and their relationships with her, among other things to support her application. However, I cannot reassess the weight that was given to the record by the officer.

B. *BIOC*

[41] With respect to the BIOC analysis, the Applicant stated that there was significant evidence through supporting letters of the relationship that the Applicant's son had with her mother, half-siblings, and cousins in Canada. There was significant information on the Applicant's decision to leave Jamaica that included the trauma of a third robbery and her ability to overcome adversity to raise a child on her own. The Applicant had submitted objective evidence of adverse country conditions for children in Jamaica, and states that the officer's

conclusion that it was in her son's best interest to stay with his mother to be meaningless as this is a given in most cases. The Applicant argues that the officer erred by failing to give significant weight to the BIOC factor in her H&C application.

[42] Of note, the Applicant argues that the officer erred in only giving "some weight" to the BIOC factors in the overall assessment of the H&C application, contrary to the guidance set out in the case law that the BIOC should garner "significant weight" given the finding of emotional hardship.

[43] The Applicant takes issue with the officer's conclusion that her son's interests will be met because he will be with his mother, his primary care provider. She states that this is unintelligible citing Justice Fuhrer in *De Oliveira Borges v Canada (Citizenship and Immigration)*, 2021 FC 193 at para 6).

[44] The Respondent argues the officer's use of "some weight" in the Decision is akin to a "treasure hunt for errors," contrary to the guidance in *Vavilov*. The Federal Court of Appeal has long established that once an officer has well identified and defined the BIOC factors, "it is up to her to determine what weight, in her view, must be given to the circumstances… It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada … that the Minister must exercise his discretion in favour of said parent" (*Legault* at para 12).

[45] Indeed, *Baker* clarifies that while a decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them, that is not to say that children's best interests must always outweigh other considerations, or that there will be no other reasons for denying an H&C claim even when children's interests are given consideration (*Baker* at para 75).

[46] The crux of the argument in respect to the BIOC in this case is that it is in the best interest of the Applicant's child to stay in Canada given the better education, health and social circumstances compared to Jamaica. However, in light of the limited submissions to demonstrate any special circumstances to justify an exemption under an H&C application, it was reasonable for the officer to find that the evidence provided was insufficient.

[47] It was also not unreasonable to find that being with his mother was in his best interests. This was not reductive as it was alleged, as the benefit of being with a loving and involved parent is a relevant consideration and not merely "stating the obvious" (*Ahmed v Canada (Citizenship and Immigration)* 2020 FC 777 at para 26, citing *De Sousa v Canada (Citizenship and Immigration)* 2019 FC 818 at para 38).

[48] An H&C decision is not unreasonable simply because the officer states that it is in a child's best interest to remain with their parents (*Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821 [*Mebrahtom*] at para 16).

[49] The Applicant's argument related to the use of the term "some weight" instead of "substantial weight" as a conflict with the guidance in *Kanthasami* was also addressed in *Mebrahtom*. As Justice MacHaffie described in that decision, that a BIOC analysis to be given substantial weight or be a significant focus of the assessment does not mean that all BIOC assessments necessarily weigh heavily in favour of granting an application. While "substantial weight" must still be assessed of its relative importance in the overall assessment, it does not necessarily follow that using the term "some weight" in the Decision means that the child's interests have been inappropriately minimized or not recognized as an important factor. The BIOC factor must still be assessed based on the evidence of the particular child and their particular circumstances (*Mebrahtom* at para 21). Even with the need to give the BIOC significant weight in an H&C application, "it does not follow that the [BIOC] must outweigh other considerations in the analysis" (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, citing *Baker* at para 75 as quoted in *Kanthasamy* at para 38).

[50] Relevant evidence submitted by the Applicant included her own affidavit and supporting letters of friends and family. This evidence focused on the relationships and emotional aspects of having the Applicant's child geographically close to family in Canada, and the impact of a physical separation. The Applicant's submissions in her H&C application was that it was in the Applicant's son's best interests to remain in Canada with his mother because the child has a very close relationship with his grandmother, aunt, uncles, and cousins. The Applicant referenced these letters during the hearing, and they speak to a "support system in Canada," how the family members helped when they could, and that separation would "break (their) hearts."

[51] The issue with the Applicant's submissions is that the officer's finding was that there was insufficient evidence in respect of the BIOC, not that it was in the child's best interests to relocate to Jamaica. Indeed, the common theme in respect of the application was a lack of evidence to establish the assertions made. The information provided that the Applicant's child would be at risk of violence or crime in Jamaica was made through submissions and general country conditions. However, there was no evidence to connect these particular conditions to the child.

[52] The officer's BIOC assessment related to the Applicant's child's particular circumstances based on the record before them. The officer concluded that they did not find that the weight accorded to the BIOC was enough to justify an exemption under the *IRPA*.

[53] Given the record, I cannot find that the officer's assessment of the BIOC was unreasonable.

C. *Hardship*

[54] The Applicant's arguments in relation to the hardship she would experience in Jamaica was also focused on the contention that the officer either erroneously misapprehended or ignored evidence. She stated that the officer ignored the Applicant's affidavit and other letters of support because these pieces of evidence were not mentioned in the Decision.

[55] One of the focuses of these arguments was the officer's finding that there was insufficient evidence with respect to the robberies alleged by the Applicant. The Applicant argued that the

officer cited one of the cousin's letters and concludes there is no other evidence of the robberies, identifying the officer's statement that "outside of the statements made by the applicant's family members in their letters of support there is little information in regards to robberies that the applicant is said to have been a victim of."

[56] The Applicant conceded in their written submissions and at the hearing that there was no evidence that she had reported these robberies to the police. However, she stated that the letters from her family in Canada and in Jamaica, and some close friends confirmed that the robberies occurred. The Applicant's own affidavit claims the robberies occurred because of her success as a recording artist, but there is no evidence in the affidavit or elsewhere of any motivation or suspect behind the robberies. The Applicant asserts that Jamaica's adverse country conditions relating to hardship were personalized to her because she was the victim of violence and crimes and that the officer erred in not giving that sufficient consideration.

[57] I cannot reweigh the officer's assessment of the Applicant's evidence under this factor. With respect, the only evidence the Applicant submitted to tie the robberies to the adverse country conditions for hardship were her sworn affidavit and letters from third parties, with no identification of the perpetrators of the robberies, and speculation about the motivation of the robberies. The Applicant did not submit any evidence to substantiate the assertions and speculations made. As such, it was open to the officer to find that she had not provided sufficient evidence to establish adverse country conditions as a factor for hardship specific to her personal situation.

[58] General adverse country conditions which do not have a clear relationship with an applicant's specific and personal situation do not weigh in favour of permanent residence being granted based on H&C considerations (*Del Chiaro Pereira v Canada (Citizenship and Immigration)* 2022 FC 799 at para 60).

[59] The officer is presumed to have considered all of the evidence before them, and is not required to refer to every piece of evidence in the record (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). That said, the more important the evidence that is not specifically mentioned and analyzed in the officer's reasons, the more willing a court may be to infer that the officer made an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at paras 14-17).

[60] After a fulsome review of the evidence that was before the officer, I cannot find evidence that was contradictory or was ignored. The officer references and quotes from the evidence the Applicant did submit, but noted that the Applicant's evidence gave little helpful information, or presented statements without supporting evidence. All of the letters provided high-level descriptions of robberies, but without any key details. The Decision is responsive to the evidence that was submitted. As such, I cannot find that the officer's assessment of hardship was unreasonable.

[61] An H&C exemption is an exceptional and discretionary remedy. It should not be treated as another way of immigrating to Canada, as subsection 25(1) of the *IRPA* was not intended to be

an alternative immigration scheme (*Shakleford* at para 12). While I am sympathetic to the Applicant, an assessment of an H&C application requires more than a sympathetic case, and it was the Applicant's onus to present sufficient evidence to support her application.

VI. Conclusion

[62] On the basis of the above reasons, I have been unable to find that the officer's Decision was unreasonable. Rather, I find that it is justified in relation to the facts and law that constrained the decision maker (*Vavilov* at para 83). As such, the application for judicial review is dismissed.

[63] The parties both confirmed that there was no question of general importance to be certified. I agree that none arose in this case.

JUDGMENT in IMM-7116-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There are no questions for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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