

Federal Court



Cour fédérale

Date: 20250121

Docket: IMM-1515-23

Citation: 2025 FC 124

Ottawa, Ontario, January 21, 2025

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

JA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant has been in Canada for over twenty years. She made an application for permanent residence based on humanitarian and compassionate grounds (“H & C Application”). She asked to remain based on her establishment in Canada, the best interests of her god-daughter, the hardship in returning to Cameroon due to lack of consistent access to HIV medication and the stigma she would face because of her HIV health condition.

[2] An officer at Immigration, Refugees and Citizenship Canada (“the Officer”) refused her H & C Application. The Applicant is challenging this refusal on the grounds the Officer took a hardship-centric approach and failed to address the contradictory and relevant evidence on access to medication and the stigma and discrimination against those living with HIV in Cameroon. I agree with the Applicant that the Officer’s assessment of the evidence was unreasonable.

[3] The Respondent raised the “clean hands” bar and asked the Court to not decide the merits or not grant the relief being sought on this basis. I find that though the Applicant engaged in serious misconduct, this misconduct does not undermine my ability to consider the merits of the judicial review, and given the serious interests at stake and strength of the Applicant’s challenge, I find that I am able to grant the relief the Applicant is seeking.

II. Background to Judicial Review

[4] The Applicant is a citizen of Cameroon. She has been living continuously in Canada for over twenty-two years. Shortly after arriving in Canada, the Applicant learned of her HIV diagnosis. The Applicant has made a number of applications to remain in Canada. The Applicant’s refugee claim was denied in 2004. A Pre-Removal Risk Assessment (“PRRA”) was refused in 2011. The Applicant made two other H & C Applications, refused in 2011 and 2016. Critically, the Applicant explains that the thresholds for medical costs constituting an “excessive demand” fundamentally changed since her second H & C Application was refused in 2016, prompting her to file the H & C Application that is at issue in this judicial review.

[5] On September 7, 2022, the Officer refused the Applicant's H & C Application. The Applicant applied for an extension of time to file the application for leave and judicial review and for an anonymity order. Justice Gleeson granted the extension of time and anonymity requests.

III. Analysis

A. *"Clean Hands" Bar*

[6] The Applicant was supposed to leave Canada and fly to her country of citizenship, Cameroon, on August 19, 2021. She did not attend at the airport as directed by Canada Border Services Agency ("CBSA") and a warrant for her arrest was issued. A few weeks prior to her removal date, the Applicant made an H & C Application that is at issue on this judicial review.

[7] The Respondent raised the doctrine of "clean hands" as a bar to this Court granting the relief the Applicant is seeking. The Federal Court of Appeal in Canada (*Minister of Citizenship and Immigration*) v *Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*] explained that where the reviewing court is satisfied that the applicant is guilty of misconduct, the court "may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief" (*Thanabalasingham* at para 9 [emphasis in original]) In exercising its discretion, a reviewing court is "to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights". The Federal Court of Appeal set out a list of non-

exhaustive factors a reviewing court may consider: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question; the need to deter others from similar conduct; the nature of the alleged administrative unlawfulness and the apparent strength of the case; and the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand (*Thanabalasingham* at para 10).

[8] I have carefully considered the factors set out in *Thanabalasingham* in deciding whether the Applicant's misconduct should bar her from obtaining the relief she seeks on this judicial review. The Applicant admits that her misconduct is serious. I agree. It is also conduct that warrants deterrence. However, I agree with Justice Norris's reasoning in *Alexander v. Canada (Citizenship and Immigration)*, 2021 FC 762 [*Alexander*] that "there are other mechanisms for achieving this [deterrence] (e.g. the detention review process under the IRPA and related regulations" (*Alexander* at para 44).

[9] I do not find that the Applicant's misconduct has hindered my ability to evaluate the reasonableness of the decision at issue. As I will explain below, the Applicant has established that the Officer's consideration of the evidence on a key factor was unreasonable. I also find that the interests at stake for the Applicant are serious ones, including being able to access medication and social supports without the fear of discrimination and stigma.

[10] While there is no doubt that the Applicant's misconduct was serious and warrants deterrence, there are strong merits in this challenge to the legal soundness of a decision that

implicates her fundamental human rights. In these particular circumstances, even though I have found the Applicant is engaged in serious misconduct, I have decided to consider the merits of the decision and grant the relief the Applicant is seeking.

B. *Evaluation of the Evidence on Access to Medication and Stigma*

[11] Foreign nationals applying for permanent residence in Canada can ask the Minister to use their discretion to relieve them from requirements in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because of humanitarian and compassionate factors (IRPA, s 25(1)). The Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [Kanthasamy], citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [Chirwa], confirmed that the purpose of this humanitarian and compassionate discretion is “to offer equitable relief in circumstances that ‘would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another’” (*Kanthasamy* at para 21 citing *Chirwa* at p 350).

[12] Given that the purpose of humanitarian and compassionate discretion is to “mitigate the rigidity of the law in an appropriate case”, there is no limited set of factors that warrant relief (*Kanthasamy* at para 19). The factors warranting relief will vary depending on the circumstances, but “officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them” (*Kanthasamy* at para 25; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 74-75).

[13] The Applicant raised the stigma and discrimination against those living with HIV in Cameroon as a key basis for her request for relief. The Applicant explained that though she is close to her siblings, who she financially supports from Canada, she has not disclosed her HIV health condition to them. The Applicant further explained that though she was not living with HIV when she lived in Cameroon, over twenty years ago, she knows from her experiences with the Cameroonian community in Canada that there is significant stigma against those living with HIV in Cameroon. The Applicant provided country condition reports on the conditions in Cameroon for those living with HIV, including the stigma and discrimination they face and the impact of this stigma on access to medication, employment and bank loans.

[14] Though the Officer accepts that the Applicant “may face some hardship as an HIV positive woman should she return to Cameroon”, they do not accept that “the hardship that she may face due to stigmatization warrants humanitarian relief.” The Officer’s assessment of this factor is limited and based on a selective reading of the evidence that does not consider the contradictory, relevant segments of the same evidence.

[15] For example, the Officer finds -- based on one study of a support group in the Dschang health district -- that “support groups, much like the ones that the applicant is a member of in Canada, are also available in Cameroon.” The Officer further finds “the applicant may be able to access treatment without stigmatization in Cameroon.” Yet, much of this study the Officer references describes a different reality. It describes the severe stigma and discrimination experienced by those living with HIV in Cameroon. Yes, having a support group helps, but a key takeaway from the article that is missing from the Officer’s analysis is the difficulty faced by

those living with HIV even where they have been able to access a support group. Further, the Officer's assumption that the support group in Dschang is similar to the supports that the Applicant is receiving in Canada is not consistent with the evidence. Nor is this support group in question in the same area where the Applicant's siblings live, from whom the Officer assumes she will receive support.

[16] Another example where the Officer selectively considers the evidence is with respect to the Applicant's experiences in Canada. The Officer notes that the Applicant stated in her application that she "experienced stigmatization as a HIV positive woman during her residence in Canada." The Officer fails to mention that this stigmatization was from members of the Cameroonian community in Canada. The Applicant stated in her H & C Application that, though she had not lived in Cameroon with HIV, "she is aware of the significant stigma against the HIV positive community in Cameroon, particularly because she has also experienced it within the Cameroonian community living in Canada."

[17] The Officer then relies on this evidence to say that "no country, including Canada, is able to protect their citizens or other inhabitants from stigmatization." The Officer's reasoning suggests that because Canada, and no other country, can eliminate stigmatization, the magnitude of the stigma is irrelevant. This reasoning does not appreciate the very basis on which the Applicant was seeking relief - the prevalence and severity of stigma and discrimination she would face in Cameroon.

[18] Lastly, with respect to the Applicant's access to medication, the Officer does not address a relevant and important factor raised by the Applicant. The evidence, highlighted in counsel's submissions, noted that because of the severe stigma and discrimination people living with HIV face, many do not consistently access medical counselling and anti-viral medication.

[19] The Officer's reasons are not transparent, intelligible or justified in light of the evidence before them. Accordingly, the matter must be sent back to be redetermined. Neither party raised a question for certification and I agree none arises.

JUDGMENT in IMM-1515-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision dated September 7, 2022 is set aside and sent back to a different decision-maker for redetermination; and
3. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1515-23

STYLE OF CAUSE: JA v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 18, 2024

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: JANUARY 21, 2025

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