Federal Court  Cour fédérale

Date: 20250211

Docket: IMM-11664-23

Citation: 2025 FC 265

Ottawa, Ontario, February 11, 2025

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MARJORIE CASTRO NGIAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Marjorie Castro Ngiao [Applicant], a 50-year-old citizen of the Philippines, is seeking judicial review of a September 1, 2023 decision [Decision] by an Officer with Immigration, Refugees and Citizenship Canada [IRCC]. The Officer denied the Applicant's third request for permanent resident [PR] status as a member of the Live-in Caregiver Class with a request for humanitarian and compassionate [H&C] relief.

[2] This application for judicial review is allowed. The Officer erred in their analysis of the Applicant's establishment factors.

II. Background

[3] The Applicant is divorced, has three children and two grandchildren, who all reside in the Philippines. The Applicant came to Canada on November 15, 2009, under the Live-In Caregiver Program [LCP] as a temporary foreign worker. Eventually she obtained a second work permit.

[4] The Applicant submitted her PR and work permit applications through a process that became quite complicated. Suffice to say, both the PR and work permit were refused. The Applicant was instructed to leave Canada. With the assistance of an immigration consultant, the Applicant submitted a reconsideration request for her PR. In January 2016, the PR reconsideration request was refused.

[5] In July 2017, with the assistance of a lawyer, the Applicant submitted a second application for PR and a work permit under the LCP. These applications were refused on August 29, 2019, and the Applicant was issued a section 44 report for remaining in Canada beyond her authorized period. The Applicant was again instructed to leave Canada.

[6] With the assistance of a new lawyer, the Applicant submitted a third PR application on December 16, 2019. The section 44 report was reviewed, and an exclusion order was issued on December 6, 2022. The Applicant submitted letters, additional information from employers, and was interviewed.

[7] The Applicant's third PR application was refused on December 13, 2022. The reviewing officer was not satisfied the H&C factors presented were sufficiently compelling to overcome the Applicant's inadmissibility. The Applicant sought judicial review. The decision was quashed and sent back to IRCC for redetermination by a new officer [Officer]. The Applicant was provided an opportunity to update her H&C factors for consideration. The Applicant provided additional documents in response to the Officer's request.

[8] The Officer refused the PR application on September 1, 2023. They were not satisfied that the Applicant's personal circumstances involved H&C considerations that justified overcoming the eligibility requirements. This is the Decision presently under review.

[9] Throughout this process, the Applicant has continued to work in Canada, providing assistance to her sister in the Philippines.

[10] The Applicant notes that the Certified Tribunal Record [CTR] originally filed with the Court consisted of only 80 pages and was missing 90% of the Applicant's materials. The Respondent explained this was due to the size of the file. An amended CTR was later uploaded to the Court on May 5, 2024. The Applicant notes no explanation was provided for the alleged technical glitch.

III. Decision

[11] The Officer determined the factors cited in the PR application were insufficient to grant an exemption on H&C grounds.

[12] The Officer considered the Applicant's submissions on her good civil record and positive relationship with Canadian authorities. However, the Officer held that "a good civil record and positive relationship with Canadian authorities is an expectation of individuals who reside in Canada rather than an exception". The Officer found the fact that the Applicant remained in Canada working without status for nine years, paying income taxes for only one of those years, constituted disregard for Canada's immigration regulations and other requirements of those living and working in Canada. This did not weigh in the Applicant's favour.

[13] While the Applicant demonstrated some establishment through her community, friends and neighbours, the Officer found these relationships could be maintained from abroad. Additionally, the Officer recognized the Applicant's romantic relationship, finding that if the Applicant were to marry, she would have the option to apply for status under the family class.

[14] The Officer considered the Applicant's submissions on the best interests of her children in the Philippines. The Officer noted the Applicant's children are adults, with no evidence suggesting they are unable to provide for themselves. The Officer also found no explanation as to why the Applicant's sister could not financially support her own children. The Officer acknowledged the Applicant sends money home to her daughter but found no evidence as to how that money is disseminated or who benefits. The Officer weighed this factor less significantly, noting that the money sent by the Applicant was earned while working without authorization. Further, the Officer found that the Applicant's children, grandchildren, and relatives would benefit from her physical and emotional support were she present in the Philippines.

[15] The Officer found the Applicant provides childcare for two families in Canada with a total of seven children between them. The families provided letters of support, which contained positive statements about the Applicant. Concerning the first family, the Officer found evidence indicating the Applicant worked two days a week mostly doing cleaning and household chores. The Officer found no evidence of the Applicant's direct relationship with the family's children (ages 14, 16 and 17). Regarding the second family, the Officer found the Applicant worked for them on a part-time basis for the past two years. The Officer noted the family has employed several caregivers over the years for their children. Overall, there was no evidence showing the children in Canada would suffer any hardship due to the Applicant's absence. The Officer further noted the Applicant made no mention of the childcare focused work in her interview with the previous officer.

[16] The Officer considered the Applicant's submission that the demand for caregivers will exceed the number of available workers in the coming years. Since the Applicant indicated she had not worked primarily as a caregiver, the Officer did not weigh this factor in her favour.

[17] The Officer considered the Applicant's submissions on the reduced standard of living in the Philippines. The Officer noted the purpose of section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] is not to compensate for differences in a standard of living. Rather, *IRPA* s. 25(1) allows for an exceptional response to a set of unforeseen circumstances.

[18] The Officer acknowledged the country condition documents finding little indication of how the Applicant would be directly impacted by those conditions. The Officer recognized the

Applicant would experience some hardship in returning to the Philippines, but determined that hardship was not sufficient to warrant the requested relief.

IV. Issues and Standard of Review

[19] This matter raises the following issues and sub-issues:

1. Was the Decision reasonable?
    a. Did the Officer err in their assessment of the best interests of the children?
    b. Did the Officer err in their analysis of the Applicant's establishment?
    c. Did the Officer err in their analysis of the Applicant's hardship?
2. Was the Decision procedurally fair?

[20] As I have found the Officer erred in their analysis of the Applicant's establishment, there is no need to address the remaining issues.

[21] The parties agree the standard of review on this issue is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). I agree. This case does not engage any of the exceptions set out by the Supreme Court of Canada in *Vavilov,* therefore the presumption of reasonableness is not rebutted (at paras 16-17).

V. Analysis on Establishment

(1) Applicant's Position

[22] The Officer erred in refusing to assign positive weight to any of the Applicant's factors of establishment, solely focussing on her lack of immigration status. Specifically, the Officer failed to consider the following positive factors of establishment recognized in the *Guidelines on Humanitarian and Compassionate Assessment: Establishment in Canada* (3 Feb 2017), Government of Canada:

a) the Applicant has lived in Canada for over 14 years;
b) the Applicant has filed many applications to the immigration authorities to regularize her status;
c) the Applicant has worked to support herself for her entire residence in Canada;
d) the Applicant is deeply integrated in her community in Canada; and
e) the Applicant has no criminal record.

[23] The Officer failed to assign positive weight to any of these factors. Rather, the Officer found these establishment factors were "an expectation" or "not unusual". Since establishment accrued during a period of noncompliance, the Officer assigned no positive weight.

[24] The Applicant argues these factors are meritorious reasons to forgive noncompliance. However, the Officer acted as if noncompliance erased their merit. Jurisprudence explicitly cautions officers against focussing on the defect from which H&C relief is requested (*Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at para 23). Turning positive

establishment factors on their head and using them against an applicant as a sword rather than a shield, has been held as unreasonable (*Alghanem v Canada (Citizenship and Immigration)*, 2021 FC 1137 at para 39).

[25] While an officer may attribute negative weight to past noncompliance (*Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 23-4), the officer must still attribute positive weight to establishment achieved during a period of noncompliance (*Wang v Canada (Citizenship and Immigration)*, 2022 FC 368 at paras 21-5). An applicant's noncompliance should only be counted once. It cannot be assigned negative weight and then be used to cancel out positive weight factors.

[26] The negative weight of past noncompliance should be reduced where the noncompliance was caused or prolonged by factors outside an applicant's control (*Trinidad v Canada (Citizenship and Immigration)*, 2023 FC 65 at paras 35-40).

[27] The Officer failed to consider the Applicant's many attempts to regularize her status since 2013. The Officer also failed to consider the following facts: the Applicant lacked funds to hire counsel in 2015-2016; she was delayed by divorce proceedings in 2016; she was hospitalized in 2017; and that the first two counsel she retained delayed preparing her applications and submitted erroneous filings without her knowledge or approval.

(2) Respondent's Position

[28] The Officer did not err in their establishment analysis. The Officer explicitly recognized the Applicant's good civil record, lack of criminal record, her positive relationship with Canadian authorities, and that she has worked in Canada. The Officer weighed these factors against her non-compliance with the immigration system and concluded that her establishment was not a positive factor in her favour. The Officer did not find that her lack of status weighed against her, rather, that it did not weigh in her favour. This was a reasonable balancing assessment.

[29] It was also reasonable for the Officer to consider the Applicant's disregard for Canadian immigration laws. This Court has held that, in an H&C application, an applicant should not benefit from circumventing the usual immigration processes (*Castro Quiel v Canada (Citizenship and Immigration)*, 2023 FC 1218 at para 17).

(3) Conclusion

[30] The Officer erred in the analysis of the Applicant's establishment in Canada. This is sufficient to allow this judicial review.

[31] In the establishment analysis, I find the Officer made two errors. First, the Officer turned a positive factor that should have weighed in favour of granting exemption, into a justification for denying it. The Officer recognized the Applicant's strong ties to her Canadian community, and held it was reasonable to infer she has a strong community of friends and family to return to in the Philippines. The Officer used this positive factor as a sword rather than a shield.

[32] Second, the Officer's reasons do not account for the Applicant's many attempts to regularize her immigration status. The Officer did not consider whether the Applicant's failure to abide by Canada's immigration law was as a result of her own actions, or of circumstances beyond her control. Particularly, the Officer did not consider the Applicant's first PR application, submitted while she still had status in May 2013. Nor did the Officer consider the Applicant's several unsuccessful attempts to correct her status thereafter. Likewise, no consideration was given to the fact that the Applicant's retained counsel delayed preparing her applications and submitted erroneous filings. Positive consideration may be warranted when the applicant has been in Canada for a significant period due to *circumstances beyond his or her control* [Emphasis in *original*] (*Legault v Canada (Minister of Citizenship and Immigration)* (C.A.), 2002 FCA 125 at para 27).

[33] In summary, I find the Officer erred in assessing the Applicant's establishment in Canada. This misstep is sufficiently central to render the Decision unreasonable (*Vavilov* at para 100).

VI. Conclusions

[34] For the reasons above, this application for judicial review is allowed. The Officer failed to consider key submissions on the Applicant's establishment in Canada.

[35] The parties do not propose a question for certification, and I agree that none arises.

JUDGMENT in IMM-11664-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The matter is remitted to a different officer for redetermination.

2. There is no question for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

OCKET:	IMM-11664-23
STYLE OF CAUSE:	MARJORIE CASTRO NGIAO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

JUSTIN J. TOH	FOR THE APPLICANT
KEVIN DOYLE	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JUSTIN J. TOH, J.D., B.A. TORONTO, ONTARIO	FOR THE APPLICANT
ATTORNEY GENERAL OF CANADA TORONTO, ONTARIO	FOR THE RESPONDENT