Federal Court Cour fédérale

Date: 20220322

Docket: IMM-293-21

Citation: 2022 FC 394

Ottawa, Ontario, March 22, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

LISA MCDONALD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Lisa McDonald, seeks judicial review of the decision of a senior immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada, dated January 5, 2021, refusing the Applicant's application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The Officer also refused the

Applicant's alternative request for a Temporary Resident Permit ("TRP") under subsection 24(1) of the *IRPA.*

[2] The Applicant submits that the Officer's decision is unreasonable because the Officer erred in their assessment of the Applicant's establishment in Canada, the best interest of the child ("BIOC"), and the hardship the Applicant and her daughter would face in St. Lucia.

[3] For the reasons that follow, I find the Officer's decision is unreasonable. This application for judicial review is allowed.

II. Facts

A. *The Applicant*

[4] The Applicant is a 45-year-old citizen of St. Lucia and a single mother. She has lived in Canada since 1998. Her nine-year-old daughter ("Jacelyn") was born in Canada in 2012.

[5] The Applicant entered Canada as a visitor on August 14, 1998. On December 20, 2016, the Applicant submitted her first application for permanent residence on H&C grounds. This application was refused on March 16, 2018.

[6] On May 13, 2018, the Applicant was found to be inadmissible to Canada under section 44 of the *IRPA.* On May 30, 2019, the Applicant submitted a second permanent residence application on H&C grounds with an alternative request for a TRP.

B. *Decision Under Review*

[7] By letter dated January 5, 2021, the Officer refused the Applicant's H&C application. The Officer considered the Applicant's establishment in Canada, the BIOC with respect to Jacelyn, and the country conditions in St. Lucia.

[8] The Officer found that the Applicant did not provide sufficient evidence to demonstrate that she has established herself in Canada to an exceptional degree, and weighed her establishment against her lack of consideration for Canadian immigration laws. With respect to the BIOC, the Officer determined that Jacelyn would have access to education, public health care and family support in St. Lucia. Overall, the Officer found insufficient evidence to warrant an exemption on H&C grounds. The Officer also refused the Applicant's alternative request for a TRP pursuant to section 24(1) of the *IRPA*.

III. Issue and Standard of Review

[9] The sole issue in this application for judicial review is whether the Officer's decision is reasonable.

[10] Both parties agree that the Court is to review the Officer's decision on the standard of reasonableness. I agree that the appropriate standard of review for H&C decisions is reasonableness (*Rannatshe v Canada (Citizenship and Immigration)*, 2021 FC 1377 at para 4; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 8,

44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[11] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is 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 (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[12] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. Analysis

[13] Under subsection 25(1) of the *IRPA*, the Minister may grant permanent residency to a foreign national who does not meet the requirements of the *IRPA* if the circumstances are justified under H&C considerations, including the BIOC directly affected.

[14] An H&C exemption is a discretionary remedy. What warrants relief will vary depending on the facts and context of the case. This means that the decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) ("*Baker*") at paras 74-75), and that "[…] there will sometimes be humanitarian or compassionate reasons for admitting people who, under the general rule, are inadmissible" (*Kanthasamy*, at paras 12-13).

A. *Establishment*

[15] The Applicant submits that the Officer erred by requiring an "exceptional" degree of establishment without further explanation, and that the Officer improperly weighed positive elements of establishment against the Applicant.

[16] In considering the Applicant's establishment, the Officer gave some positive weight to the support letters from the Applicant's friends and community in Canada, yet was not satisfied that the Applicant's ties to Canada are so significant that her departure would have a negative impact on her or her network. The Officer also considered the Applicant's efforts to improve her education and gave some positive weight to the monetary savings she acquired through her employment as a housekeeper. However, the Officer found these positive establishment factors to be less favourable because the Applicant was not authorized to study or work in Canada during her stay. The Officer concluded:

> Overall, I will accept that the applicant has been employed and self-sufficient throughout her time in Canada and I give this factor some positive consideration. I note, however, that the applicant has

> worked in Canada illegally throughout her stay in Canada, and there is little evidence to demonstrate that she has been paying income tax on the income earned throughout her stay. I find that this does not weigh favourably in this assessment. I find, overall, the applicant has not demonstrated that she has achieved an exceptional degree of establishment since arriving in Canada.
>
> [Emphasis added].

[17] The Applicant submits that, given the substantial evidence of her establishment in Canada, the Officer unreasonably dismissed the Applicant's establishment by unduly focusing on the Applicant's lack of status in Canada. The Applicant notes that the Officer improperly turned positive establishment factors against her because of her unauthorized employment. The Applicant argues that being in Canada without status does not automatically make establishment factors inapplicable in an H&C analysis, and that the very purpose of section 25 of the *IRPA* is to provide an exemption for those who may have lost their status and would face hardship if required to leave a place where they have become established (*Baker* at para 15; *Benyk v Canada (Citizenship and Immigration)*, 2009 FC 950 at para 14).

[18] The Applicant further submits that the Officer's reasons provide her with no way of knowing how her particular establishment falls short. While circumstances of an applicant's lengthy stay in Canada without status are relevant to H&C considerations, the Applicant maintains that this Court has repeatedly held that an applicant's positive establishment factors must be considered as a whole and it is an error to require an "exceptional" level of establishment without setting a benchmark (*Kachi v Canada (Citizenship and Immigration)*, 2015 FC 871 at paras 15-16; *Chandidas v Canada (Citizenship and Immigration)* 2013 FC 258 at para 80; *Stuurman v Canada (Citizenship and Immigration)* 2018 FC 194 at paras 19-24). The

Applicant argues that the Officer in this case failed to account for the length of time she has spent in Canada, her history of stable income and relationship with her clients, her stable residential tenancy, and her integration in the community.

[19] The Respondent contends that it was appropriate for the Officer to determine that the Applicant has not demonstrated that she has achieved an exceptional level of establishment in Canada, as H&C relief remains an exceptional remedy (*Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 ("*Huang*") at paras 20-21; *Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 at paras 13-14). As noted by this Court in *Huang*, at paragraph 20:

> [20] […] applicants for [H&C] relief must demonstrate the existence of misfortunes or other circumstances that are exceptional, *relative to other applicants who apply for permanent residence from within Canada or abroad.*
>
> [Citations omitted, emphasis in original.]

[20] The Respondent relies on *De Melo Silva v Canada (Citizenship and Immigration)*, 2013 FC 941 to argue that it was open to the Officer to note that the Applicant's establishment resulted from the fact that she was in Canada without status, a situation within her control: "The number of years spent in Canada, in and of themselves, under illegal circumstances, in respect of the immigration law is not a reason to reward such behaviour." (at para 8).

[21] The Respondent maintains that the Officer did not fetter their discretion by considering this factor, as other positive elements of the application were also considered, such as the Applicant's relationships in Canada and her steady employment. The Respondent states that the

Officer adequately reviewed all the documentation provided and committed no error, as it was open to them to attribute more weight to certain factors over others. The Respondent relies on this Court's decision in *Villanueva v Canada (Citizenship and Immigration),* 2014 FC 585 at paragraph 11 to submit that the Officer's assessment of the Applicant's establishment was reasonable:

> [11] […] I see no error in the Officer's analysis of the Applicants' establishment in Canada. The Officer has the expertise and experience necessary to permit him or her to identify the level of establishment that is typical of persons who have resided in Canada for the same approximate length of time as the Applicants and, therefore, to use this as a yardstick in assessing their establishment.

[22] I am not persuaded by the Respondent's arguments. I do not find that the Officer's decision fully apprehended all of the evidence and relevant factors raised by the Applicant, nor does this decision best reflect the intent behind subsection 25(1) of the *IRPA* (*Vavilov* at paras 133-135). I find that the decision also lacks justification, as the Officer fails to explain why the evidence of the Applicant's establishment is insufficient. As noted by my colleague Justice Gleeson in *Jimenez v Canada (Citizenship and Immigration),* 2021 FC 1039 at paragraph 28:

> [28] Although H&C relief pursuant to subsection 25(1) of the IRPA may well be described as exceptional, extraordinary or special relief, these descriptors do not establish a legal standard that an applicant must meet. Instead, and in accordance with the equitable underlying purpose of subsection 25(1), a decision maker is required to substantively and cumulatively consider and weigh *all* relevant facts and factors raised (*Kanthasamy* at paras 25, 28 and 31). The Officer's establishment analysis is unreasonable for this reason.

[23] Moreover, in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 at paragraphs 1-2, my colleague Justice Zinn also found that it is unreasonable for an officer to require an H&C applicant to show "exceptional" circumstances when seeking relief:

> [1] There is a fundamental and significant difference when making decisions on humanitarian and compassionate grounds between, on the one hand, observing that the relief is exceptional and, on the other hand, requiring an applicant seeking relief on humanitarian and compassionate grounds to show exceptional circumstances warranting the relief.
>
> [2] The second is not the proper test. The officer reviewing Mr. Zhang's application for permanent residence on humanitarian and compassionate grounds [the Officer] used that improper test. The Officer required Mr. Zhang to demonstrate that his circumstances were "exceptional" and this is not the legal threshold required in humanitarian and compassionate decisions. The decision is therefore unreasonable.

[24] While I note that the Officer's decision does in fact recognise the length of time the Applicant has spent in Canada, I agree with the Applicant that the Officer placed an undue focus on her lack of status and failed to fully review the extent of the Applicant's establishment in Canada. The Applicant has lived in Canada since she was 22 years old. The evidence before the Officer demonstrates that for over two decades, the Applicant has been self-sufficient, maintained steady employment, supported herself and her daughter, and formed a strong network in Canada. This is confirmed in several letters of support from the Applicant's employers, friends and community members that speak to the Applicant's personal character, work ethic, and commitment to family. Whether or not she was authorized to study or work, the Applicant still advanced her studies and maintained stable employment, a positive establishment factor that should not have been diminished by her lack of status in Canada.

[25] Upon review, I do not find that the Officer's analysis of the Applicant's establishment adequately applied the approach advanced in *Kanthasamy.* I therefore find that the Officer's conclusion with respect to the Applicant's establishment lacks justification and is unreasonable.

B. *BIOC*

[26] The Applicant submits that the Officer failed to conduct the contextual analysis outlined in *Kanthasamy,* which requires that the BIOC principle be applied "[…] in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). In particular, the Applicant submits that the Officer ignored Jacelyn's level of establishment in Canada and how she would be negatively affected by a relocation to St. Lucia.

[27] In considering the BIOC, the Officer noted that it would be in Jacelyn's best interests to remain with her mother and that while Canada is the only home Jacelyn knows, a period of adjustment in St. Lucia is to be expected. The Officer also conducted their own research on the education system in St. Lucia and determined:

> While I accept that Canadian education is preferable to an education from St. Lucia, I am unable to conclude that Jacelyn will be unable to receive an education should she relocate to St. Lucia with the applicant. Little to no evidence has been submitted to indicate the applicant's daughter will be unable to receive an education in St. Lucia.

[28] The Officer concluded that the potential negative impact of a refusal of the H&C application on Jacelyn's best interests was not sufficient to warrant an exemption.

[29] The Applicant submits that rather than identifying what would be in Jacelyn's *best* interest and engaging in a thorough BIOC analysis, the Officer merely focused on the potential hardships associated with moving to St. Lucia. In doing so, the Officer did not consider how moving to St. Lucia would affect Jacelyn's well-being, and instead adopted a "basic needs" approach to their assessment of the BIOC, an approach that this Court has found unreasonable (see: *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at paras 63-64*; Patousia v Canada (Citizenship and Immigration)*, 2017 FC 876 at paras 53-56; *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 ("*Sebbe*") at para 16).

[30] The Applicant notes that while her H&C submissions did not state that Jacelyn would not be able to receive an education in St. Lucia, the evidence does demonstrate Jacelyn's excellent performance at school in Canada. Given this, the Applicant argues that the Officer failed to consider whether it would be in Jacelyn's best interest to remain in the Canadian school system, in which she is excelling. The Applicant relies on *Sebbe* at paragraph 15 to argue that basing the BIOC analysis on whether Jacelyn would be able to receive a basic need is unreasonable:

> [15] In stating that "there is insufficient evidence before me to indicate that basic amenities would not be met in Brazil" the Officer is importing into the analysis an improper criterion. He appears to be saying that a child's best interest will lie with staying in Canada only when the alternative country fails to met the child's "basic amenities." That is neither the test nor the approach to take when determining a child's best interests. […]

[31] Furthermore, the Applicant submits that the Officer erred in finding: "[…] regardless of where the family unit is residing, the best interest of the applicant's daughter will be to continue being raised and nurtured by mother." The Applicant argues that this flawed "basic needs" logic

is unreasonable, as it would render a BIOC analysis redundant if it is always in the best interest of any child to remain with their parent(s), who may be subject to removal.

[32] The Respondent contends that a review of the Applicant's H&C application demonstrates that the central theme of the BIOC submissions was that it is in Jacelyn's best interest to remain with her mother. It was thus reasonable for the Officer to make such a determination, since the Applicant had not identified specific interests of Jacelyn's that required further assessment. The Respondent also maintains that the Officer did not engage in a hardship analysis by focusing on whether Jacelyn could overcome the difficulties of relocating to St. Lucia. As was the case in *Mashal v Canada (Citizenship and Immigration),* 2020 FC 900, "[…] the Officer was not treating hardship as a prerequisite to a favourable BIOC assessment but, rather, was considering the particular concerns emphasized by the Applicants in their H&C application" (at para 25).

[33] The Respondent compares the case at hand to the decision in *Silwamba v Canada (Citizenship and Immigration),* 2019 FC 1442 ("*Silwamba*"), in which this Court found at paragraphs 6-8 that there was insufficient evidence to demonstrate that the applicants' children would be seriously emotionally, psychologically or educationally affected if they left Canada:

> [6] […] While an officer is usually expected to determine where the children's best interests lie before analyzing the impact on them of a positive or negative decision, an officer cannot be expected to carry out that kind of exercise when little evidence is provided by the applicants about the children's circumstances.
>
> [7] […] The officer found that [the] evidence was insufficient to show that the children would be seriously affected emotionally, psychologically, or educationally if the family had to return to Zambia to make their permanent residence application from there.

> [8] The applicants have not identified any information in their submissions that the officer overlooked. One can presume that the officer realized that the children's best interests would be served by allowing them to remain in Canada. He did not have to state that explicitly in his reasons.

[34] The Respondent also cites this Court's decision in *Landazuri Moreno v Canada (Citizenship and Immigration)*, 2014 FC 481 ("*Landazuri Moreno*") at paragraph 37 to argue that in a BIOC assessment, it is not sufficient to show that it might be better for a Canadian-born child to remain in Canada than to live in their parents' country of origin:

> [37] In the absence of any personalized evidence to the contrary, the Officer could reasonably conclude that the best interests of the children were to remain in the care of their parents, and that the hardships associated with relocation could reasonably be expected to be minimal given their young ages. There was no evidence that the children would not be able to access health care and education in Columbia or Mexico, and it was certainly not sufficient to show that Canada is a more favourable country to live than the country of origin of their parents […].

[35] I do not find the Respondent's reliance on *Landazuri Moreno* to be helpful, nor do I characterize this case as one where there was "little evidence" (*Silwamba* at para 6) about Jacelyn's circumstances. In *Landazuri Moreno*, the officer's BIOC analysis was found to be reasonable in light of the limited information submitted by the applicant regarding his minor children, including a lack of explanation of how the children's best interests would be affected if they were to leave Canada (para 35). In the case at hand, while the Applicant's BIOC submissions did highlight the Applicant and Jacelyn's close relationship, they also provided evidence of Jacelyn's established life in Canada, the conditions in St. Lucia, and specific reasons

why it is in Jacelyn's best interest to remain in Canada, beyond maintaining stability through the connection to her mother.

[36] I agree with the Applicant that the Officer's approach to the BIOC failed to adequately contemplate how Jacelyn would benefit from staying in Canada, where she was born and raised, and where she has been attending school, building friendships and participating in extracurricular activities. The evidence before the Officer demonstrates that Jacelyn is a social student who is thriving at school and is well-established in her community. I therefore find that the Officer failed to account for the evidence as a whole to meaningfully consider the disruptive impact that a removal from Canada would have on Jacelyn, and failed to consider what is in Jacelyn's *best* interests in a manner that is responsive to her specific circumstances (*Sebbe* at para 16; *Kanthasamy* at para 39; *Baker* at para 75).

[37] I also note that the Officer repeats the following paragraph twice in their BIOC analysis:

> With respect to the best interests of the child, I am alert, alive and sensitive and acknowledge that it is an important factor and should be given significant weight in the assessment of a humanitarian and compassionate application. In sum, factors concerning the best interest of the applicant's child, constitute the most compelling aspect of the application before me, and I have accordingly given this factor very careful consideration.

[38] Simply repeating that they were 'alert, alive and sensitive' does not mean that the Officer was in fact 'alert, alive and sensitive' to Jacelyn's best interests, nor do I find that this was reflected in the Officer's analysis and reasons (*Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at paras 8-12, citing *Baker* at para 75). As affirmed in *Kanthasamy,*

"[…] decision-makers must do more than simply *state* that the interests of a child have been taken into account" (at para 39, citing *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 32).

[39] Overall, based on the evidence and submissions before the Officer, I find the denial of H&C relief in this case to be untenable (*Vavilov* at para 99). Having determined that the decision is unreasonable based on the Officer's flawed assessment of the Applicant's establishment in Canada and the BIOC, I find it unnecessary to address the Applicant's arguments with respect to adverse country conditions and the hardship she would face in St. Lucia.

V. Conclusion

[40] For the reasons above, I find that the Officer erred in their assessment of the Applicant's establishment and the BIOC with respect to Jacelyn. I therefore find the Officer's decision to be unreasonable.

[41] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-293-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different officer.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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