Federal Court  Cour fédérale

Date: 20220718

Docket: IMM-1784-21

Citation: 2022 FC 1050

Ottawa, Ontario, July 18, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

NERISA MAY CAMPBELL-SERVICE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision of a Senior Immigration Officer ("the Officer") of Immigration, Refugee and Citizenship Canada dated March 14, 2020, rejecting the Applicant's application for permanent residence on humanitarian and compassionate ("H&C") grounds.

[2] The Applicant submits that the Officer:

- ignored contradictory evidence & adopted a boilerplate approach;
- erred in assessing hardship the Applicant would face in Jamaica; and
- erred in the exercise of his discretion by failing to consider the underlying humanitarian reasons for the Applicant's non-compliance.

II. Background

[3] The Applicant, Nerisa May Campbell-Service, is a citizen of Jamaica. She arrived in Canada on December 5, 2012, with a visitor's visa valid until October 31, 2014, and has remained since that time without status. Her spouse remains in Jamaica.

[4] The Applicant was employed intermittently as a caregiver in Jamaica from May 2008 until December 2012. In Canada, she was able to secure an employment as a caregiver in Toronto. She cares for an 81-year-old man (herein after "Mr. S") who has a number of health issues including diabetes and kidney problems. His health has improved since she became his caregiver.

[5] She alleged that her life has been seriously constrained by the violence in Jamaica, limiting her movements and her ability to earn a living.

[6] In 2018, she submitted an H&C application, which was denied on March 14, 2020.

III. Issue

[7] The issue is whether the Officer's decision was reasonable.

IV. Standard of Review

[8] As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 23, "where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." I see no reason in this case to deviate from this general presumption. As such, the standard of review in this case is that of reasonableness.

[9] In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Vavilov* at para 13). When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99).

[10] A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when

read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

V. Analysis

[11] The Applicant argued issues that were not contained at all in the written materials. I will not exercise my discretion and entertain those issues given the potential unfairness to the Respondent.

[12] The Applicant provided detailed examples of what she indicated the Court should find unreasonable in the decision. However, in the end the Applicant's argument boiled down to the weight given to the evidence by the Officer. This is, of course, not the role of this Court on judicial review (see *Vavilov* at para 125). On a reasonableness review, the Officer could have weighed matters differently but I do not find the Officer's determination on all the issues was unreasonable, and find that it was justified, intelligible, and transparent.

A. *Lack of status*

[13] The Applicant, in their written material had submitted that the Court has discretion to allow an application on its merits even if an applicant comes to Court with unclean hands. In oral argument, this was presented as the Officer giving too much weight to the fact she gained her establishment by being in Canada without status. Then, the Applicant argued that the Officer held this factor to be determinative, which was not reasonable. Specifically, the Applicant submits that s. 25(1) of the *Immigration and Refugee Protection* Act, S.C. 2001, c. 27 ("*IRPA*")

is intended to deal with cases of inadmissibility, which may often stem from circumstances involving unclean hands. In fact, s. 25(1) "presupposes that an Applicant has failed to comply with one or more of the provisions of the *IRPA*." Thus, it is the Applicant's point of view that the Officer was required to assess the nature of the non-compliance and its relevance and weight in the context of the other H&C factors, and not simply invoke the non-compliance as an obstacle to the granting of relief.

[14] The Applicant states that the very purpose of s. 25 is to deal with cases of inadmissibility, which may often stem from circumstances involving unclean hands. The Applicant cites case law that indicates that the purpose of s. 25 of the *IRPA* is to deal with people who are without status for one reason or another (*Benyk v Canada (Citizenship and Immigration),* 2009 FC 950 at para 14; *Mitchell v Canada (Citizenship and Immigration),* 2019 FC 190 at para 23). However, the reason behind the non-compliance with the immigration laws is important.

[15] The fact that s. 25 contemplates that individuals will be without status does not make this an irrelevant consideration. There are many circumstances in which individuals may accumulate time in Canada – for example, as refugee claimants, under temporary work permits, or where there is a temporary suspension of removals to an individual's home country. This was not the case for the Applicant, who came to Canada as a visitor and remained voluntarily, taking no steps to regularize her status between 2014 and 2018.

[16] Further, the Applicant has been in Canada for over seven years with no status. As stated in *Lin v Canada (Citizenship and Immigration)*, 2011 FC 316 at paragraph 3, "[t]he Applicant

has an obligation to regularize her status if she wishes to remain in Canada […].” Therefore, it is not unreasonable for the Officer to consider that factor and attribute negative weight, since the Applicant has not demonstrated that she is unable to return to her country at any time and apply for permanent residence there and did not demonstrate any effort in regularizing her status. Since it was her own choosing, I see no error in the Officer’s analysis (*Shallow v MCI*, 2012 FC 749 at paras 8-9).

[17] In addition, I do not agree with the Applicant that the Officer’s emphasis on her “deliberate non-compliance of immigration regulations” cast a shadow over the exercise of its discretion, which precluded it from properly analyzing the H&C factors put forth. The Officer went on to consider other factors and evidence, including the Applicant’s friends in Canada and connection to her community, family in Jamaica and country conditions. Nothing in the Reasons suggests that the Officer fettered discretion by making the Applicant’s overstay and illegal work determinative. It was open to the Officer to consider the lack of status and weigh it against the other factors. The Applicant’s non-status was but one factor in the analysis.

[18] I find it reasonable for the Officer to consider the Applicant’s accumulation of time in Canada without authorization and to weigh this against her establishment, especially because she took no steps to regularize her status between 2014 and 2018. It was open to the Officer to consider the establishment acquired through her voluntary remaining in Canada without status. Contrary to the Applicant’s submissions, I find that the Officer did not err by considering the Applicant’s non-compliance with the Canadian immigration law. Since the Officer considered the Applicant’s establishment and personal circumstances, the decision is not unreasonable and it

is a matter of weighing the factors, and reweighing them is not the role of this Court (*Vavilov* at para 125).

B. *Applicant's Other Arguments*

[19] The Applicant submits that the Officer ignored contradictory evidence. For instance, that the Officer ignored evidence about the availability of police assistance and used outdated reports, although an updated version of the same document was available to the Officer. She argued that the objective evidence demonstrated that justice is unavailable through the dysfunctional judicial system and violence against women continued to be a severe problem. Further, the Applicant said that the Officer ignored the Applicant's affidavit evidence as well as evidence of the failure of Mr. S's attempt to access the support and care that he needs, and the letters of support that demonstrate the importance and necessity of the Applicant as a caregiver. The argument concluded that the Officer's finding that there are many caregivers in Canada who are competent and able to provide care for Mr. S is unreasonable.

[20] The Applicant also submits that the Officer erred in assessing the hardship that the Applicant would face in Jamaica. Particularly, the Applicant argues that the Officer applied the wrong legal test as he was assessing the "risk of return to Jamaica" which is the appropriate analysis for s. 97 of the *IRPA* rather than s. 25 of *IRPA.* The Applicant submits that the Officer failed to assess the gender-based discrimination and the adverse country conditions that have a negative impact on the Applicant. The decision is, in their view, unreasonable as the Officer failed to engage meaningfully with the evidence and failed to engage with the H&C factors put forth.

C. *Analysis*

[21] It is my view that the Officer's decision was made in light of the Applicant's submissions and supported by the evidence.

[22] The Applicant has indicated in her submissions that she fears general crime and violence. First, the Applicant contends in her Memorandum that the hardship she would face as a woman in Jamaica is central to her application, and she is faulting the Officer for ignoring evidence confirming that statement. As stated by the Respondent, the Applicant did not raise that issue in her H&C submissions, thus, that argument was not before the Officer. Similarly, the Applicant did not claim in her submissions to be at risk of arbitrary arrest or detention by the police. The quote cited in her Memorandum at paragraph 31 does not support the concerns stated in her submissions. She has not indicated that she was ever suspected as a criminal, therefore, that citation does not apply to her. She has also not demonstrated that the police will not assist her in case of need, or that she has ever sought protection and did not receive any.

[23] Therefore, it is my view that the Officer did not ignore evidence that goes to the contrary of his conclusion, and cannot be faulted for ignoring certain risks that were not put forth by the Applicant, such as gender-based discrimination. Thus, it is my view that the Officer reasonably reviewed the evidence that supports the Applicant's allegations in her submission, and reasonably concluded that she will be able to seek protection if needed. Also, it is worth noting that the Officer did not only rely on a 2015 report, but also relied on a 2018 report dated 13 March 2019.

[24] Further, the Applicant relies on *Pamal v Canada (Citizenship and Immigration)*, 2021 FC 1064 [*Pamal*], at paragraphs 14-20, to argue that it is an error in law to consider the fact that her immediate family resides in Jamaica and they can assist her in resettling. As the Respondent correctly noted, the Officer in *Pamal* disregarded the evidence that the applicant did not have close relationships with her family and she could no longer count on her friends. This is not the case here, as the Applicant did not provide any evidence that she does not have a good relationship with her family or that they are unable to assist her. In fact, it is not unreasonable for the Officer to consider the presence of her immediate family in her country of origin.

[25] The Officer conducted a reasonable assessment of country conditions in Jamaica by reviewing the evidence and submissions. The Applicant has not challenged the finding by providing objective evidence that she would be able to find work in Jamaica. Thus it is reasonable given her previous work experience there and experience accumulated during her time in Canada that she would find employment. In addition, it is not unreasonable to consider the support that she would receive from her family should she return to Jamaica. The Officer recognized the Applicant's ability to support herself through the years she resided in Jamaica, as well as when she came to Canada, which he stated as commendable. I see this as a reasonable assessment and a logical conclusion.

[26] Moreover, I do not agree with the Applicant that the Officer applied the wrong legal test by assessing the "risk". I agree with the Respondent that while the Applicant takes issue with the Officer employing the language of "risk" in considering conditions in Jamaica, this language is reflective of the Applicant's own submissions, and was reasonable.

[27] Contrary to the Applicant's submissions, the Officer did not err and assess the risk the Applicant may face required by s. 97 of the *IRPA*. The Officer was using the Applicant's H&C grounds used in her submissions, which included the potential risk of return to Jamaica (unemployment and crime) and worked in cleaning jobs.

[28] The Respondent submitted that the Applicant cited portions of the USDOS report on Jamaica that have little to no relationship to the concerns raised by the Applicant. For instance, the Applicant did not claim a risk of gender-based or domestic violence in her H&C submissions. The onus was on the Applicant not only to show the existence of general adverse country conditions in Jamaica, but also to tie those conditions to her particular circumstances. By reading the overall reasons, it is clear that the Officer was explicitly analyzing the Applicant's fear of unemployment and crime and did not do the wrong test.

[29] The Applicant raised several factors that, in her opinion, "would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another." The Applicant argued that the decision was bereft of compassion and thus unreasonable. The Applicant submitted the Officer stating that her family would support her was unreasonable given that the Applicant has to send money back to her family, as well as that her mother-in-law and sister are now deceased.

[30] The Applicant submits that the Officer's decision with what she sees as not having applied any compassion when assessing the application is in error given one cannot detect any appreciation of the *Chirwa* approach from *Chirwa v Canada (Minister of Citizenship and*

Immigration), (1970), 4 IAC 338. In the Applicant's view, the Officer neglected to apply an essential element of the H&C test, and in doing so, committed a reversible error.

[31] The Applicant said that she loves Canada, and that if the Officer had shown compassion that she would be able to stay and continue working the job she loved and that the person she was a caretaker for would continued to receive the care that she provided, which she notes was far better than what he had received before. She noted that the Officer may have been compassionate or showed sympathy to the individual she cared for, but not for her. She argued that the Officer did not use the *Chirwa* factors and instead just speculated as to what would happen.

[32] The fact that the Officer must demonstrate compassion, as per the *Chirwa* approach and *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, does not necessarily mean that the factors should be assessed in favour of the Applicant.

[33] I disagree with the Applicant and find that the Officer displayed compassion. The Officer acknowledged the difficulties the Applicant may face upon her return, but concluded that it is reasonable to expect her immediate family (including her spouse) to support her, as there is no evidence to the contrary. The Officer expressed sympathy for the past difficulties faced by the Applicant's employer in finding adequate care, but was not satisfied that there was sufficient evidence that demonstrated that he could not find another competent caregiver in Canada.

[34] The Officer demonstrated compassion by recognized the Applicant's efforts in her employment, and the difficulties she and her employer might face. The Applicant argued that this was what she loved doing and once again noted her employer's struggles finding a competent caregiver aside from her. The evidence that was before the decision-maker, including her self assessment and evidence she loved her job, did not make the Officer's decision unreasonable in light of all the circumstances and the objective evidence.

[35] I agree with the Applicant that the Officer did not engage with certain evidence such as the letter of supports and the Applicant's affidavit, but it is trite law that a decision-maker need not refer to each evidence, as he is presumed having considered all the evidence on the record (*Ruszo v Canada (MCI),* 2018 FC 943 at para 34; *Jama v Canada (PSEP),* 2019 FC 1459 at para 17).

[36] It is clear by reviewing the evidence that the Applicant is playing an important role, and is providing a care that Mr. S's family could not find in any of the 6 caregivers they have hired. However, the Officer was not satisfied that there was sufficient evidence that demonstrates that Mr. S's would be unable to find a competent and compassionate caregiver to care for him in Canada. Although it may be harder to find a caregiver exactly how Mr. S's wishes, as stated by the Respondent, there was no evidence before the Officer that the Applicant has particular skills or training that made her uniquely suited to provide his care. It was reasonable for the Officer to find that, in light of the general availability of care in Canada, other arrangements could be made.

[37] Thus, although I agree that the Officer did not explicitly assess the hardship concerning this particular issue and the Decision is lacking explanation regarding that specific hardship, it is my view that this error does not render the overall decision unreasonable. I disagree with the Applicant that the evidence directly contradicts the Officer's finding that competent and compassionate care is available. Despite having difficulty finding a good caregiver, as stated by the Officer, many caregivers in Canada are competent and able to provide care for Mr. S. It is not reasonable to think that because few caregivers were not competent enough that Canada does not have any competent caregiver, or any medical centre that can assist Mr. S. Thus, having difficulty in finding a good caregiver does not eliminate the possibility of eventually finding another sufficient one or alternate care.

VI. Conclusion

[38] For all the reasons detailed above, the Officer's Decision dismissing the Applicant's request on H&C grounds represented a reasonable outcome based on the law and the evidence. On a standard of reasonableness, it suffices if the decision subject to judicial review falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law. It is my view that this is the case here. In my opinion, the Officer displayed compassion while assessing each factor, but there was insufficient objective evidence before the Officer to satisfy him that a positive exemption is warranted on H&C grounds. Section 25 is an exceptional remedy, and the Officer reasonably concluded that the Applicant was not able to demonstrate that a positive exemption should be warranted under s. 25.

[39] Therefore, I am dismissing the application for judicial review.

[40] No questions for certification were raised.

JUDGMENT IN IMM-1784-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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