

Federal Court



Cour fédérale

**Date: 20230825**

**Docket: IMM-5271-22**

**Citation: 2023 FC 1138**

**Toronto, Ontario, August 25, 2023**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**NIRACHHA KHADKA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This is an application for judicial review of a decision of a Senior Immigration Officer [Officer], dated May 27, 2022 [the Decision], in which the Officer refused the Applicant's application, under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] As explained in greater detail below, this application is dismissed, because I find that the Officer's reasoning is transparent and the Decision is therefore reasonable.

## II. **Background**

[3] The Applicant is a 39-year-old citizen of Nepal. She is married and has a six-year-old son, who was born in Canada and is a Canadian citizen. While her husband, who is the child's father, lives in Nepal, the majority of her other family members reside in Canada and are either citizens or have permanent resident status here. These family members include her parents, brother, two sisters, sister-in-law, and two brothers-in-law.

[4] The Applicant came to Canada as a visitor in July 2015 and, while here, gave birth to her son. As she did not have permanent status in Canada, she returned to Nepal with her son in January 2016 prior to the expiry of her visa. She and her son subsequently visited Canada again in 2016, 2017, and 2018. Her most recent entry into Canada was in October 2020.

[5] The Applicant submitted her H&C application in July 2021.

## III. **Decision under Review**

[6] In assessing the merits of the H&C application, the Officer considered the Applicant's establishment in Canada and the best interests of her child [BIOC].

[7] With respect to establishment, the Officer noted that the Applicant had always maintained valid immigration status during her stays in Canada. While applauding her commitment to maintaining her immigration status, the Officer placed neutral weight on this factor, because temporary residents of Canada are expected to respect Canadian immigration laws.

[8] The Officer gave little weight to the Applicant's financial considerations and employment history in Canada. The Officer noted that the Applicant does not work in Canada, but that she lives with family in Canada who provide her with financial assistance, in addition to her husband who sends money from Nepal. The Officer found there to be little evidence that the Applicant would need financial assistance if she were to return to Nepal, and there was little evidence her family would not assist her in those circumstances.

[9] The Officer gave some positive weight to the letters of support submitted by the Applicant. The Officer noted that the Applicant had volunteered in, and had established personal relationships with, individuals in her community.

[10] The Officer placed little weight on the time the Applicant had spent in Canada. The Officer noted that one of the conditions for obtaining temporary resident status was to leave Canada at the end of the authorization period. The Officer therefore found it reasonable for the Applicant to have expected that she would have to leave Canada. The Officer further noted that, if the Applicant were to return to Nepal, she would be returning to a place where she has born and raised, has family, received education and training, and understands the language, customs

and culture. The Officer concluded that there is little evidence to suggest she cannot return to Nepal based on the time she spent in Canada.

[11] The Officer granted some positive weight to the Applicant's strong family ties in Canada.

[12] Turning to the BIOC, as will be canvassed in more detail later in these Reasons, the Officer considered the impacts on the Applicant's son in the event of either a positive or negative H&C decision. The Officer ultimately concluded that the BIOC favoured a positive decision but did not find it to be a determinative factor.

[13] Based on these analyses, the Officer concluded that relief under subsection 25(1) of the IRPA was not warranted.

#### IV. Issue and Standard of Review

[14] The sole issue raised in this application for judicial review is whether the Decision, and in particular the Officer's BIOC analysis, is reasonable. As suggested by this articulation of the issue, the parties agree (and I concur) that the applicable standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

#### V. Analysis

[15] It is common ground between the parties that the Officer did not identify any negative factors militating against granting H&C relief. Rather, in considering each element of the

Applicant's case on the establishment factor, the Officer afforded the element either neutral weight, little weight, or some positive weight, and the Officer found that the BIOC favoured a positive decision. Against that backdrop, the Applicant argues that the Decision is not transparent, and is therefore unreasonable under the principles explained in *Vavilov*, because the Officer failed to explain why H&C relief was not warranted.

[16] The Respondent submits that the Applicant's argument amounts to raising an issue of sufficiency of reasons, which is not a stand alone ground for judicial review (see, e.g., *Boukhanfra v Canada (Citizenship and Immigration)*, 2019 FC 4 at paras 18-21). The Respondent argues that the Decision is reasonable, because the Officer considered the factors raised in the Applicant's H&C submissions and weighed those factors as required. In the Respondent's submission, the Officer simply was not satisfied that the circumstances raised by the Applicant, and the evidence provided in support thereof, was sufficient to warrant an H&C exemption from the usual requirement to apply for permanent residence from outside Canada.

[17] I find that the Decision is transparent and therefore reasonable.

[18] For each element of establishment considered by the Officer, the Decision sets out an analysis and resulting conclusion as to the weight to be afforded that element. As noted above, the most favourable of these assessments was "some positive weight", which I read as an indication that the Officer was not affording a significant amount of weight to the relevant element.

[19] With respect to the BIOC, upon which the Applicant's submissions principally focus, the Officer considered the effect upon the Applicant's son of both a positive and negative H&C decision. The Officer explained that, in a positive decision, the Applicant would be able to stay in Canada permanently and her son would continue to stay in Canada with her and his extended family. In a negative decision, the Applicant would have to leave Canada when her visitor record expires, and it would be up to her and her husband to decide whether their son should reside in Canada (as he is entitled as a Canadian citizen) or should return to Nepal with them. The Officer noted that the parents could also continue to apply for temporary resident status to visit Canada and take care of their son from abroad and could look into applying for permanent residence from abroad.

[20] The Officer then referenced the Applicant's submissions surrounding her son's improved state of mind when in Canada and the benefits, in terms of education, healthcare and safe environment among family, that Canada would offer him. The Officer noted the Applicant's submission that in Nepal her son faces grave difficulties in language and communication that affect his learning and development and cause him anxiety and depression. However, the Officer found that there was little corroborative evidence to support this submission.

[21] The Officer recognized the benefits to the Applicant's son of living in Canada, including better infrastructures than in Nepal and the ability to spend time with his extended family, and found that the BIOC favoured a positive decision. However, the Officer found that this was not a determinative factor.

[22] I agree with the Respondent that the Officer canvassed the Applicant's submissions and explained the weight afforded to each factor. While the BIOC was a positive factor, the Decision explained, as outlined above, why the Officer did not afford it sufficient weight to be determinative.

[23] In the Conclusion section of the Decision, the Officer referred to having assessed the application globally and having weighed cumulatively all the factors submitted including BIOC considerations. Noting that the onus was on the Applicant to provide evidence in support of the requested H&C relief, and that such relief represents an exceptional measure and not merely an alternative means of applying for permanent resident status in Canada, the Officer explained that they were not satisfied that the evidence submitted and the Applicant's particular circumstances warranted an exemption. With the benefit of the Decision's preceding analysis of the establishment and BIOC factors, this conclusion is transparent and intelligible, and the Decision is therefore reasonable.

[24] Having found the Decision reasonable, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

**JUDGMENT IN IMM-5271-22**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5271-22

**STYLE OF CAUSE:** NIRACHHA KHADKA v. MCI

**PLACE OF HEARING:** BY WAY OF VIDEOCONFERENCE

**DATE OF HEARING:** AUGUST 23, 2023

**JUDGMENT AND REASONS:** SOUTHCOTT J.

**DATED:** AUGUST 25, 2023

**APPEARANCES:**

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