Federal Court  Cour fédérale

Date: 20240117

Docket: IMM-4518-22

Citation: 2024 FC 66

Ottawa, Ontario, January 17, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

PHUONG NHI TRINH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, who is self-represented, is a citizen of Vietnam. She came to Canada on a visitor's visa in January 2016. In a decision dated May 3, 2022, a Senior Immigration Officer [Officer] refused her application for permanent residence [PR] from within Canada on humanitarian and compassionate [H&C] grounds.

[2] The Applicant now applies under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the refusal decision.

[3] For the reasons that follow, I have concluded that the Officer's decision to refuse the H&C relief following a global consideration of the identified H&C factors is not supported by a transparent and justified explanation. The Application is granted.

II. Background

[4] In June 2019, the Applicant married a Canadian citizen and applied for spousal sponsorship that same year. As she then became a victim of physical and emotional abuse, she separated from her spouse in March 2022. In April 2022, the Applicant's H&C application was submitted.

[5] The application identified a number of H&C factors: establishment in Canada; the impact of departure from Canada on the Applicant's youngest son; the violence the Applicant had experienced at the hands of her former spouse, including the physical and mental impact of that abuse; and the hardship she would experience upon return to Vietnam, including her fear that her former spouse would carry through on a threat to have her harmed in Vietnam.

[6] The Applicant identifies herself as being Hmong and Christian. In the H&C application, the Applicant raised concerns about the discrimination against Hmong people and Christians in Vietnam, as well as the treatment of human rights advocates.

III. Decision under review

[7] In refusing the application, the Officer first noted that the Applicant bears the onus of demonstrating that humanitarian and compassionate considerations justify granting the relief sought. The Officer then addressed the Applicant's submissions under the headings of establishment in Canada, domestic abuse and country conditions in Vietnam.

[8] In considering establishment, the Officer noted that the Applicant had been working without authorization for some time but did not give this factor negative weight, citing the Applicant's abusive relationship and recognizing that she needed to be able to support herself. The Officer gave positive consideration to the Applicant's involvement with her church and her volunteer work which was corroborated by letters of support and a letter of recommendation from her church. The Officer accepted that the Applicant is close to her youngest son who is a university student in Canada. As the son is a Vietnamese citizen who could visit or return to Vietnam, the Officer concluded the relationship could be maintained should the Applicant return to Vietnam. The Officer found there to be insufficient evidence to demonstrate that her son would not be able to support himself should the Applicant leave Canada.

[9] In assessing the physical and emotional abuse, the Officer gave significant weight to the fact that the Applicant experienced domestic abuse, and that she originally expected to receive PR status through the sponsorship of her former spouse. The Officer noted, however, that this was but one factor to consider within a global H&C assessment. The Officer also accepted the Applicant's diagnosis of "Adjustment Disorder with Depressed Mood, Marital problem" as

disclosed in a psychological assessment and acknowledged that the disorder would make the return to Vietnam more difficult.

[10] In considering country conditions and hardship, the Officer found the reported concerns of discrimination toward Hmong people and Christians in Vietnam to be vague. The Officer noted the Applicant had been employed in Vietnam and had obtained an education. The Officer also noted that the Applicant had failed to provide any personalized evidence or additional details to support her assertions of discrimination or to establish she is Hmong or, would be so perceived. After a consideration of the objective evidence assessing the conditions in Vietnam for Christians, the Officer accepted conditions relating to freedom of religion are not ideal, but indicated that not all Christians in Vietnam face discrimination. The Officer found that the Applicant did not demonstrate that she had been, or would be, impacted or discriminated against for religious reasons, yet the Officer did accept that it would be difficult for the Applicant to return to such an environment and gave this some consideration.

[11] The Officer also accepted that the treatment of human rights protestors in Vietnam as well as the conditions relating to political participation are not ideal. Nevertheless, the Officer held there was a lack of evidence to establish that the Applicant's uncle and cousin were convicted human rights advocates. The Officer further held that there was little information to demonstrate that the Applicant is a protestor, or that she would be perceived as one through family association. In assessing the reported threats from the Applicant's former spouse, the Officer held that the H&C analysis was not an assessment of risk.

[12] In sum, the Officer concluded that there was sufficient evidence to demonstrate that country conditions in Vietnam are not ideal, but that there was a dearth of evidence linking the Applicant to those conditions. The Officer, however, accepted that returning to such an environment would be difficult and gave some consideration to this factor. The Officer also concluded the Applicant would encounter some difficulties in re-establishing herself in Vietnam with no family in the country.

IV. Preliminary Matter

[13] At the outset of oral submissions, counsel for the Respondent advised that there was documentation in the Applicant's Record that was not before the decision-maker. Counsel flagged an August 9, 2022 statement from the Applicant's youngest son (Applicant's Record at page 74 (as marked)). In addition, the Applicant's Record includes a June 1, 2022 letter from a psychiatrist that, based on the date of the letter, could not have been before the decision-maker (Applicant's Record at page 64 (as marked)).

[14] Subject to recognized exceptions, none of which arises here, judicial review is to be undertaken based on the record that was before the decision-maker. I therefore have not considered the documents referenced above.

V. Issues and Standard of Review

[15] The Applicant has identified a series of issues that I have reframed as a single issue – whether the decision to refuse the Applicant's request for H&C consideration was reasonable.

[16] The standard of review to be applied to an Officer's H&C determination is reasonableness (*Gonzalez Donoso v Canada (Citizenship and Immigration)*, 2022 FC 959 at para 8; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23-25 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44).

[17] In conducting a reasonableness review, a reviewing court will exercise judicial restraint. An administrative decision-maker is to be given deference, particularly where the impugned decision is one where an exemption or discretionary privilege is sought, as is the case here (*Vavilov* at para 30, *Alghanem v Canada (Citizenship and Immigration)*, 2021 FC 1137 at para 20). A reviewing court will examine the reasons holistically and contextually in order to understand the reasoning behind the decision and assess whether the the decision reflects the attributes of a reasonable decision – justification, transparency and intelligibility.

VI. Analysis

[18] The Applicant argues that the Officer failed to demonstrate compassion in conducting the review, failed to appreciate the impact of the domestic abuse she has experienced, and failed to properly assess the hardship and risks she will be exposed to if required to return to Vietnam. She further submits the Officer erred by not considering the best interests of her child [BIOC], an adult son.

[19] The Respondent argues the decision is reasonable. The Respondent submits that the Officer considered the Applicant's letters of support, the relationship with her youngest son, the

abuse she had experienced and the country conditions in Vietnam, and came to the conclusion that there were insufficient H&C factors to warrant an exemption. I disagree.

[20] The Officer's consideration and treatment of the individual H&C factors was reasonable, and I am satisfied that the Officer approached the application with compassion and understanding. The Officer engaged with the evidence in considering the three broad factors upon which the Applicant relied in seeking H&C relief and reached conclusions that were reasonably available and transparently justified in light of the evidence. The Officer was not required to undertake a BIOC analysis in the absence of some evidence indicating the Applicant's adult son was substantially dependent upon her (*Nahrendorf v Canada (Citizenship and Immigration)*, 2022 FC 190 at para 10). The fact that the Officer chose not to view the Applicant's unauthorized work in Canada as a negative factor demonstrates a sensitivity to the Applicant's circumstances, contradicting the Applicant's view that the Officer was lacking in compassion.

[21] However, a reasonable assessment of the individual H&C factors is not sufficient. An H&C determination is to be reached after a global assessment of all of the circumstances. The Officer recognized this to be so and signalled that a global assessment was to follow when stating that the Applicant's experience of abuse in Canada, despite having been given significant weight, was but one factor and that the H&C decision would be the result of a global assessment of all factors. The Officer accurately signalled that the global assessment is determinative of the outcome. That aspect of the analysis must also be justified, transparent and intelligible.

[22] In some instances, a summary of the Officer's consideration of the individual H&C factors followed by a peremptory conclusion that relief is either warranted or not will be reasonable. Where, for example, the individual factors consistently point in one direction or the other, little more need be said in undertaking the global assessment, as a positive or negative conclusion will logically and obviously flow from the proceeding analysis. However, where, as here, the individual factors are mixed, *Vavilov* teaches that a reasonable decision must allow for an understanding of the Officer's reasoning.

[23] In this case, and as summarized above, the Officer's conclusions in respect to the three major H&C factors were mixed. Positive consideration was assigned to aspects of the Applicant's establishment, significant positive consideration was given to the Applicant's experiences of physical and emotional abuse, but the Officer found there to be little evidence to support the Applicant's hardship and risk concerns. However, the Officer did accept that returning to Vietnam in light of the general country conditions would be difficult and that the Applicant would encounter some difficulties, as she had no family. The acknowledged difficulties in returning would appear to have some potential significance in the Officer's global assessment as the diagnosis of the Applicant's psychiatrist was accepted without reservation and the Officer acknowledged the diagnosed mental health condition might make retuning to Vietnam more difficult.

[24] Simply put, the outcome of the global assessment flowing from the mix of considerations identified in the Officer's analysis is neither evident nor obvious.

[25] The Officer's global assessment consists of four paragraphs. Three paragraphs provide a summary of the Officer's prior consideration of each of the major H&C factors, and the fourth states a conclusion. As *Vavilov* instructs, a summary followed by a peremptory conclusion "will rarely assist a reviewing court in understanding the rationale underlying a decision […]" (para 102). That is so here. The result is an unreasonable decision.

[26] Having concluded the decision is unreasonable, I will only briefly touch on a second concern. In the Officer's short summary of the establishment factor, the Officer states that the Applicant has shown some establishment in Canada but that establishment is not "in my mind, considered an exceptional level of establishment to justify a waiver of regulatory requirements." This suggests the Officer was of the view that the Applicant was required to demonstrate exceptional establishment before H&C relief could be justified.

[27] Section 25 of the IRPA is an extraordinary provision in the sense that it provides an avenue for relief where an Applicant otherwise fails to satisfy the requirements of the IRPA. However, the extraordinary nature of the provision does not equate to the Applicant having to demonstrate extraordinary establishment before relief will be available. This Court has held on many occasions that imposing a requirement for extraordinary establishment is an error warranting intervention (*Zhang v Canada (Citizenship and Immigration),* 2021 FC 1482 at paras 26-29; *Damian v Canada (Citizenship and Immigration),* 2019 FC 1158 at paras 19-21; *Subar v Canada (Citizenship and Immigration),* 2022 FC 340 at para 28; *Farhat v Canada (Citizenship and Immigration),* 2023 FC 1427 at para 27; *Jimenez v Canada (Citizenship and Immigration),*

2021 FC 1039 at paras 27-28; *Cadougan v Canada (Citizenship and Immigration)*, 2023 FC 501 at paras 24-25).

VII. Conclusion

[28] For the above reasons, the Application is granted. The parties have not identified a question of general importance and none arises.

JUDGMENT IN IMM-4518-22

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The matter is returned for redetermination by a different decision-maker.

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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