Federal Court  Cour fédérale

Date: 20220329

Docket: IMM-4440-21

Citation: 2022 FC 428

Ottawa, Ontario, March 29, 2022

PRESENT: Madam Justice Walker

BETWEEN:

SHEDA BRIGITTE KATUMBUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Katumbus, is a citizen of the Democratic Republic of Congo (DRC). She came to Canada in 2014 and claimed refugee protection. The Refugee Protection Division (RPD) refused the Applicant's claim in 2015 and the RPD's decision was confirmed on appeal to the Refugee Appeal Division (RAD) in 2016.

[2] The Applicant submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds in 2019. The application was refused on January 14, 2021 (H&C Decision) and the Applicant requested reconsideration of the negative H&C Decision in May 2021. She now seeks the Court's review of the decision of a senior immigration officer dated June 9, 2021 refusing her request for reconsideration (Reconsideration Decision).

[3] I have found that the Reconsideration Decision is not reasonable. The officer strayed beyond the first stage of analysis of a request for reconsideration and engaged, albeit briefly, with the Applicant's new evidence and submissions in support of the reconsideration request. Having effectively reopened the H&C Decision, the officer failed to justify their conclusions with reasons that respond to the review framework established in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*). As a result, this application for judicial review of the Reconsideration Decision will be allowed.

I. The H&C Decision

[4] In the negative H&C Decision, the officer assessed the factors identified by the Applicant and assigned moderate weight to each:

> Best interests of the child: The children in question are the Applicant's grandchildren whom she looks after for her daughter. The officer acknowledged that the Applicant had established a relationship with her grandchildren but, without details as to the ages and number of grandchildren, the hours the Applicant looks after them and a sense of the highlights of their relationship, this factor was not determinative.
>
> Risk and unfavourable country conditions in the DRC: The officer reviewed the rejection of the Applicant's refugee claim by the RPD and RAD and attributed significant weight to those decisions. The Applicant's reliance on the same allegations of fear and persecution in her H&C application was not sufficient to establish she would be at risk in the DRC. The officer also reviewed the general country conditions in the DRC, including safety and detention issues at its international airports, generalized issues of violence and government agent impunity. The officer acknowledged the Canadian moratorium on

removals to the DRC but stated that the moratorium alone did not require a favourable H&C decision.

Establishment in Canada: The officer considered the Applicant's full-time work in Canada since 2018 as a machine operator for a clothing company and the positive letters submitted with the H&C application. Although the Applicant indicated that she would not have family support in the DRC, the officer noted that her mother and sister live there and she had not provided evidence as to why they could not assist her. The officer weighed the issues the Applicant would encounter in the DRC employment market against her prior employment there and in Canada, and her age (then 57 years old).

[5] In summary, the officer acknowledged the Applicant's stronger family ties to Canada but stated that she also has family in and close to the DRC. Further, a negative decision would not preclude the Applicant from seeing her children as she could be sponsored to return to Canada. The officer concluded that the positive considerations in the H&C application did not warrant the granting of an exemption pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

II. The Reconsideration Decision

[6] The officer considered the new information and evidence filed with the Applicant's reconsideration request and her submissions alleging errors in the H&C Decision.

[7] The officer first noted the Applicant's evidence about the grandchildren and her role in their lives, referring to a letter from her daughter. The officer then briefly reviewed the Applicant's new employment contract, which the officer found to describe pay and title comparable to those in her prior position, and additional information regarding her family in the DRC. In the officer's opinion, other than the Applicant's current employment contract, all of the information and evidence included with the reconsideration request could have been submitted before the H&C Decision was finalized. This factor weighed against reconsideration.

[8] The officer completed their review of the request for reconsideration by addressing the Applicant's submissions alleging errors in the H&C Decision.

[9] The officer concluded that the information provided did not justify reconsideration of the H&C Decision, and confirmed the refusal of the Applicant's H&C application.

III. Analysis

[10] The Reconsideration Decision is subject to review for reasonableness (*Vavilov* at paras 10, 23; *Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 at para 32 (*Hussein*)). Where the Court reviews an administrative decision for reasonableness, its role is to examine the reasons given by the decision maker and determine whether the decision "is based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[11] The jurisprudence confirms that immigration officers have jurisdiction to reconsider their decisions on the basis of new evidence or further submissions (*Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 5). The process involves two stages: first, the officer must decide whether to "open the door to a reconsideration"; and, if the officer decides to re-open the case, the second stage involves an actual reconsideration of the original decision on its merits (*Hussein* at para 55; *A.B. v Canada (Citizenship and Immigration)*, 2021 FC 1206 at para 21 (*A.B.*)). The onus is on the applicant to show that reconsideration is warranted in the interests of justice or because of the unusual circumstances of the case (*Hussein* at para 57, citing *Ghaddar v Canada (Citizenship and Immigration)*, 2014 FC 727 at para 19).

[12] The determinative issue in this application is whether the officer refused the Applicant's request for reconsideration at the first or second stage. This issue is critical to the Court's review of the Reconsideration Decision because the scope of an officer's assessment of a reconsideration request and the substance of the reasons they must provide to an applicant differ at each stage. If the applicant, and the Court, cannot determine whether the officer's decision reflects a limited first stage analysis or the fulsome review required in a second stage inquiry, the decision will lack the transparency and intelligibility required of a reasonable decision.

[13] The Applicant submits that the officer clearly undertook a second stage analysis despite their statement that reconsideration of the H&C Decision was not justified. The Applicant argues that the officer re-examined all the pertinent H&C factors against her new information, evidence and submissions but did so superficially without sufficiently justifying their conclusions.

[14] In contrast, the Respondent insists that the Reconsideration Decision reflects only the officer's decision to refuse the reconsideration request at the first stage of inquiry. The Respondent states that the officer reviewed the Applicant's circumstances, new information and reconsideration submissions; acknowledged the existence of a discretion to reconsider the H&C Decision; and provided an explanation for their refusal. The Respondent argues that this was all the law requires.

[15] Both parties rely on paragraph 31 of Justice Pentney's decision in *A.B.*:

> [31] It is inevitable that an officer will need to examine the reasons put forward to re-open a decision, and this will entail some consideration of the submissions of an applicant about why it is in the interests of justice or necessary in the circumstances to

> reconsider the original decision. In the present case, the Officer's analysis focuses entirely on the reasons put forward by the Applicant to re-open the PRRA; there is no mention of the new evidence in regard to the risks she might face, and this is the clearest indication that the Officer did not enter into the second stage of the analysis.

[16] In the present case, the officer states unequivocally that they are refusing to re-examine the H&C Decision and that the original decision stands unchanged. However, my review must assess the Reconsideration Decision as a whole.

[17] There are two aspects to the officer's analysis. The officer first considered the Applicant's new evidence and then addressed her submissions in support of the reconsideration request. It is the first aspect of the Reconsideration Decision that is problematic because it suggests an engagement with the evidence that properly arises at the second stage – the actual reconsideration (*Hussein* at para 57). In *A.B.*, one of the reasons Justice Pentney concluded that the officer in question had stopped short of reconsidering the original H&C decision was the absence of any mention in their decision of the applicant's new evidence. This was "the clearest indication" that the officer had not entered the second stage of analysis (*A.B.* at para 31).

[18] The Reconsideration Decision differs from the decision under review in *A.B.* Here, the officer referred to the Applicant's new evidence in respect of each of the three H&C factors at play. For two of those factors, the officer set out a short analysis of the nature and import of the new evidence. In my opinion, the mere mention of new evidence in a reconsideration decision does not necessarily indicate a second stage decision. Such mention or description may reasonably form part of an officer's explanation for refusing to reopen a decision. For example,

the officer's reference in the Reconsideration Decision to the letter submitted by the Applicant's daughter is not problematic. It is the officer's evaluation of the new evidence about the Applicant's establishment in Canada and her family in the DRC, and the officer's conclusions regarding the impact of that evidence on the H&C Decision, that suggest a second stage review.

[19] The officer found that the Applicant's new employment was not an important element because the pay and title in her new position are comparable to those of her prior position. With respect to the Applicant's family in the DRC, the officer recognized that she had provided more detail but concluded that the new evidence contained little information concerning the reprisals her mother had suffered, the living situation of her mother and sister, and how the Applicant remains in contact with her mother. The officer discounted the evidence because it did not contain proof of the allegations made. In so doing, I find that the officer has referred to, analysed, and drawn conclusions from, the new evidence. This analysis is properly reserved to a full reconsideration of the H&C Decision and should not form part of the initial, first stage determination of whether the exercise of the officer's discretion to reopen a prior decision is warranted (*Gill v Canada (Citizenship and Immigration)*, 2018 FC 1202 at para 14).

[20] There is little question that, as a second stage decision, the Reconsideration Decision is not reasonable. In fairness to the officer, they may not have intended to proceed to the second stage. Unfortunately, in attempting to remain within the confines of a first stage decision while explaining their treatment of the new evidence, the officer has compromised the clarity and intelligibility of the Reconsideration Decision (*Vavilov* at para 85). I find that the officer's

engagement with the new evidence precludes the Applicant from understanding the basis upon which her reconsideration request was refused and requires the Court's intervention.

[21] Finally, the Applicant submits that the officer erred in denying her reconsideration request exclusively because all of the new evidence, other than the current employment contract, could have been provided as part of the original H&C application. She argues that the officer was required to address the other factors set out in the Operational instructions and guidelines for reconsideration of a negative H&C decision published by Immigration, Refugees and Citizenship Canada (IRCC). I do not agree. An officer is not required to refer to factors in the IRCC guidelines that are not relevant to the reconsideration request under review. The Applicant has not argued, and the record does not suggest, that any of the other listed factors are important in this case. Accordingly, I find that it was open to the officer to consider the timing of the Applicant's submission of the new evidence, an issue the officer recognized was not determinative of the outcome of the reconsideration request.

[22] For the foregoing reasons, the application is allowed. No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-4440-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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