Federal Court  Cour fédérale

Date: 20220406

Docket: IMM-5571-20

Citation: 2022 FC 491

Toronto, Ontario, April 6, 2022

PRESENT: Madam Justice Go

BETWEEN:

TENNESHA ROCKHELL LAWRENCE-HAMMOND

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Tennesha Rockhell Lawrence-Hammond [Applicant] is a citizen of Jamaica. She has two children, who were born in Canada in 2009 and 2015 respectively. The Applicant's husband lives in Jamaica, where he works as an engineer for an airline.

[2] The Applicant and her husband have unsuccessfully attempted to immigrate to Canada through economic pathways based on his employment in Jamaica. In 2008, the Applicant's husband applied to the Federal Skilled Worker Program. However, his application was cancelled when the program was closed by the Canadian government. In his letter of support, he described how he tried again to reapply under the new Express Entry system but did not have sufficient points.

[3] In 2017, the Applicant applied for a work permit and a study permit but was refused.

[4] The Applicant has spent time in Canada since 2007, by way of a series of temporary resident visas. She has also spent a considerable amount of time in Jamaica during the same time period. Her children are both in school in Canada, and the older child is involved in sports and music. The Applicant and her children are involved in their church and she has taught in the children's ministry since 2016. The Applicant's father is a permanent resident of Canada, and she has two sisters who are Canadian citizens, as well as a large extended family in Canada. The Applicant and her children are living with her Canadian aunt. She holds a multiple-entry Canadian visa valid until 2025.

[5] The Applicant applied for permanent residence on humanitarian and compassionate grounds [H&C application] under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] in July 2018, adding additional submissions in September 2018 and July 2019. The H&C Application was refused in October 2020 [Decision] by a Senior Officer of Immigration, Refugees and Citizenship Canada [Officer].

[6] The Applicant seeks judicial review of the refusal of the H&C application. I grant the application as I find that the Officer erred by fettering their discretion and by ignoring evidence.

II. Issues and Standard of Review

[7] The Applicant raises two issues: (1) whether the Officer unreasonably imported a heightened legal standard to the H&C analysis by adopting stringent and arbitrary thresholds to be met, and (2) whether the Officer failed to reasonably assess the best interests of the Applicant's Canadian children.

[8] Both parties agree that the issues are reviewable on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[9] 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). The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov* at para 100). To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

III. Analysis

[10] The Applicant argues that the Officer required her to show that she was ineligible to apply for immigration by other means contrary to *Sidhu v Canada (Citizenship and Immigration)*, 2020 FC 133 [*Sidhu*] at para 12, and *Wardlaw v Canada (Citizenship and Immigration)*, 2019 FC 262 [*Wardlaw*] at para 36. In these two cases, Justices Brown and Favel found that the officer fettered their discretion by requiring the applicant to show ineligibility to apply through other means. In doing so, the Applicant submits the Officer imported a higher legal standard than that set out in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, and failed to apply the compassionate and flexible approach to H&C relief mandated by the Supreme Court.

[11] *Sidhu* seems to be particularly on point, in my view, as the Officer in that case and in the present application used identical phrases in their decision:

> There is insufficient evidence before me that she would be unable to apply in a normal manner. While it may be convenient for the Applicant to remain in Canada and apply for permanent residence, the purpose of humanitarian and compassionate applications is not convenience, but rather to allow relief and deserving cases where relief is not available through normal legislative means.

[12] The Respondent argues that where an applicant has not exhausted their options under normal immigration processes, it is reasonably open to an officer to find that the exceptional remedy of a positive H&C is not required, given the jurisprudence consistently establishes that a positive H&C decision is exceptional in nature, and that applicants for such relief must demonstrate the existence of misfortunes or other circumstances that are exceptional relative to

other applicants: *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 paras 17-20; *Buitrago Rey v Canada (Citizenship and Immigration)*, 2021 FC 852 at para 75; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16.

[13] The Respondent further argues that *Sidhu* and *Wardlaw* can be distinguished because in those cases, the Court found the officer had made other reviewable errors.

[14] I am not persuaded by the Respondent's arguments. While Justice Brown in *Sidhu* cited several other errors with respect to the officer's findings of fact, these errors were separate from, and unrelated to, his finding that the officer "fettered his discretion in stating a proposition of law that is not accurate." After quoting from the officer's findings regarding "insufficient evidence that [the applicant] would not be able to apply in a normal manner", Justice Brown continued at para 13 in *Sidhu*:

> [13] In my view this puts the test too high, but in any event, even if the statement is valid, through the principles of comity I am bound to accept the decision recently made by my colleague, Justice Favel in *Wardlaw v Canada (Citizenship and Immigration)*, 2019 FC 262, at paragraph 36 where Justice Favel stated:
>
> > [36] At several points in the decision, the Officer notes that the Principal Applicant has failed to prove that she is not eligible for the SCLPC. Nowhere in the text or purpose of subsection 25(1) does such an obligation arise. Instead, the Officer has placed a burden on the Applicants based on the policy contained in the IRCC Manual. The Officer has fettered her discretion by treating the manual as if it were a binding legal framework. [emphasis added]

[15] Given that the Decision in this case proposed, through identical language, a test that has already been rejected by the Court, I am all the more bound by the principles of comity to accept

the decision in *Sidhu*, and conclude that the Officer has fettered their discretion by imposing that very same requirement on the Applicant.

[16] Although *Sidhu* has not been commented on extensively in case law, it was mentioned in passing in *Ram v Canada (Citizenship and Immigration)*, 2020 FC 210 at para 23. Moreover, *Wardlaw* was followed in *Rocha v Canada (Citizenship and Immigration)*, 2022 FC 84 at para 35, and in *Torres v Canada (Minister of Citizenship and Immigration)*, 2017 FC 715 at para 9, Justice Martineau used similar reasoning to hold that an officer erred in suggesting alternative immigration paths "without any legal or factual knowledge of their requirements." These cases, in my view, lend support to the Applicant's submission with respect to the Officer's fettering of discretion.

[17] Furthermore, in the present application, there was evidence before the Officer indicating that the Applicant has tried to access other immigration avenues unsuccessfully, but the evidence was not addressed in the Decision.

[18] Specifically, I agree with the Applicant that the Officer ignored evidence in her husband's letter, which directly stated that he had tried to qualify under Express Entry but had insufficient points. Additionally, there was evidence that the Applicant had tried and failed to apply for a study permit. The Officer did not refer to such evidence in the Decision. Instead, the Officer only referenced a letter provided by a Member of Parliament suggesting that the Applicant's husband may qualify for Express Entry based on his education and skills. The Applicant submits, and I agree, that the Officer failed to address contradictory evidence contrary

to *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) and *Sernicula v Canada (Citizenship and Immigration)*, 2020 FC 389 at para 31, which rendered the Decision unreasonable.

[19] At the hearing, the Respondent submitted that the letter from the Applicant's husband stated that his past failures to obtain permanent resident status "did not deter our efforts", and it was thus reasonable for the Officer to conclude the Applicant and her husband would attempt to regularize their status again in the future.

[20] I do not accept this argument. Since the Decision did not even refer to the husband's letter, any argument on the part of the Respondent to suggest how the letter might have been interpreted by the Officer is speculative, and amounts to bolstering the reasons for the Decision after the fact.

[21] On this basis alone, I grant this application and refer the matter back for redetermination by a different officer. I need not consider the other arguments raised by the Applicant.

IV. Conclusion

[22] The application for judicial review is granted.

[23] There is no question for certification.

JUDGMENT in IMM-5571-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter sent back for redetermination by a different officer.
2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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