Federal Court  Cour fédérale

Date: 20220510

Docket: IMM-3685-21

Citation: 2022 FC 688

Toronto, Ontario, May 10, 2022

PRESENT: Madam Justice Go

BETWEEN:

MOLENE CARLITHA BRUCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Molene Carlitha Bruce [Applicant] is a citizen of Saint Vincent and the Grenadines [SVG]. She arrived in Canada in 2000, at age 23, to escape the extreme impoverishment she experienced growing up in her home country.

[2] The Applicant made an unsuccessful refugee claim in 2009, and the Federal Court denied leave in January 2012. Also in January 2012, the Applicant's common-law spouse at the time, P.B., filed an application for spousal sponsorship. The sponsorship application was refused in January 2014 after their relationship ended due to P.B.'s infidelity. The Applicant and P.B. has a son born in 2011 whom they co-parent. The Applicant also has an 18-year-old daughter whom she gave up from a young age as the child's father did not support the Applicant and the Applicant was unable to care for the child on her own.

[3] In February 2012, the Applicant submitted a pre-removal risk assessment [PRRA] application, which was refused in April 2012. The Applicant failed to appear for removal in June 2012. The Canada Border Services Agency issued warrants in June 2012 and again in November 2020.

[4] In December 2020, the Applicant applied for permanent residence on humanitarian and compassionate grounds [H&C application] pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Applicant relied on her establishment in Canada, the best interests of her children, and adverse country conditions in SVG.

[5] A Senior Immigration Officer [Officer] denied the H&C application on May 18, 2021 [the Decision].

[6] In seeking judicial review of the Decision, the Applicant disputes the Officer's treatment of her lack of immigration status, her evidence of establishment, conditions in her country of

origin, and the best interests of her two children. The Respondent argues that the Court should not hear this application for judicial review because the Applicant comes to the Court with unclean hands, and in the alternative, that the Decision is reasonable.

[7] For reasons set out below, I exercise my discretion to hear the application and I find the Decision unreasonable.

II. Standard of Review

[8] The parties agree that the Decision is reviewable on a reasonableness standard, per *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

A. *Should this application be dismissed on the grounds that the Applicant comes to the Court with "unclean hands"?*

[10] The Respondent asks the Court to exercise its discretion not to hear the merits of this case on the grounds that the Applicant comes to the court with "unclean hands" by choosing to remain in Canada without status and failing to appear for removal in 2012 after an unsuccessful PRRA. The Respondent cites the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*].

[11] Referencing the two warrants that were issued for her failure to attend her removal, the Respondent argues the Applicant only filed her H&C application as a result of the warrants being executed against her, and that the Applicant's failure to report for removal is serious conduct which undermined the valid removal process.

[12] Additionally, the Respondent argues that "[t]he Applicant has had ample opportunity to attempt to regularize her status but instead, she chose to have two Canadian-born children."

[13] I categorically reject the notion that the Applicant's decision to have children should be considered part of her misconduct. This argument is reminiscent of an immigration officer's rebuke of Ms. Mavis Baker for having four children in Jamaica and another four born here, before rejecting her H&C application, a decision that was overturned by the Supreme Court of Canada 23 years ago: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.

[14] A woman's right to choose to become pregnant – or to end a pregnancy – is part of her fundamental reproductive right, and is an inherent part of a woman's worth and dignity,

regardless of her immigration status. As Wilson J. stated in *R v Morgentaler*, [1988] 1 S.C.R. 30, at para 230: "an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty" under s.7 of the *Canadian Charter of Rights and Freedoms*.

[15] Contrary to the Respondent's assertion, the Applicant should not be faulted for exercising her right to become a mother – however challenging that decision might have been for her given her circumstances.

[16] As I have noted in *Onyekweli-Ugeh v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1138 [*Onyekweli-Ugeh*], *Thanabalasingham* does not stand for the notion that the Court must refuse to hear or grant an application on its merits if an applicant had come before us with unclean hands. Rather, this Court retains discretion to assess the fairness of a decision, having considered the factors set out in *Thanabalasingham* and the subsequent jurisprudence: *Onyekweli-Ugeh* at paras 33-34 citing *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 23, *Walia v Canada (Minister of Public Safety and Emergency)*, 2012 FC 1203, and *Alexander v Canada (Minister of Citizenship and Immigration)*, 2021 FC 762.

[17] At para 9, the Federal Court of Appeal in *Thanabalasingham* set out the following factors for consideration:

> [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of

> government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[18] While the Applicant has failed to appear for removal which resulted in the issuance of two warrants, the Applicant has also taken steps to regularize her status through a spousal sponsorship application in January 2012 and a PRRA application in February 2012, both of these events happened before the second warrant was issued.

[19] I have also considered the strength of the case and the impact on the applicant if the Decision is allowed to stand. As I elaborate below, a key error in the Decision lies in the Officer's misapprehension of the Applicant's immigration history. That same misapprehension, in my view, has unduly fuelled the Respondent's unclean hands argument. In short, I find this is an appropriate case to allow the application to proceed.

B. *Was the Decision Unreasonable?*

[20] The Applicant raises several arguments, of which one is determinative of the case, namely, the Officer's misapprehension of the Applicant's immigration history. The Officer found as follow:

> After arriving in Canada in December 2000, I find that she did not seek to regularize her status in Canada until submitting a claim for refugee protection in June 2009. I further find that on a balance of probabilities it is unlikely that she would have sought to regularize her status at this time had she not been detained in May 2009 for not having valid immigration status. I further note Molene had a warrant issued for her arrest in June

> 2012 as she failed to appear for her removal. I find that this application, submitted in December 2020 is her first attempt to regularize her status since this time. I find that the applicant evaded authorities and remained in Canada without valid immigration status. I do not find the applicant has demonstrated her ability to leave Canada was beyond her control and I view this as a strong negative factor in my assessment. [emphasis added]

[21] In finding that the H&C application was the Applicant's "first attempt to regularize her status", the Officer erred. No mention was made of the previous spousal sponsorship application and why that application did not count as an attempt on the Applicant's part to regularize her status.

[22] That the Applicant has lived in Canada for many years without status and without any attempt to regularize her status, from the Officer's perspective, played a key role in the refusal of the H&C. As the Officer noted, the applicant's "disregard for immigration law and her decision to remain in Canada and work without valid status", plus her failure to present for removal, "contributes significant negative weight" to the Officer's global assessment. Yet, contrary to the Officer's findings, the Applicant has in fact made a prior attempt to regularize her status through the spousal sponsorship program. Had this fact been properly taken into account, it might have mitigated the Officer's harsh criticism of the Applicant's alleged misconduct, if not altered the weight that the Officer might have given to the Applicant's establishment, when balancing against other positive factors such as the Best Interests of the Child.

[23] Because of this serious error, I find the Decision unreasonable and the matter must be sent back for redetermination. I need not consider other issues raised by the Applicant.

IV. Conclusion

[24] The application for judicial review is granted.

[25] There is no question for certification.

JUDGMENT in IMM-3685-21

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

DOCKET:	IMM-3685-21
STYLE OF CAUSE:	MOLENE CARLITHA BRUCE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	MAY 3, 2022
JUDGMENT AND REASONS:	GO J.
DATED:	MAY 10, 2022

APPEARANCES:

Adela Crossley	FOR THE APPLICANT
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Adela Crossley Crossley Law Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT