Federal Court  Cour fédérale

Date: 20220519

Docket: IMM-3250-21

Citation: 2022 FC 746

Ottawa, Ontario, May 19, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MARION HEALY FREUND

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Marion Healy Freund [Applicant] seeks judicial review an April 28, 2021 decision [Decision] of a senior immigration officer [Officer] denying her application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The application for judicial review is allowed.

II. Background

[3] The Applicant, a United States [US] citizen, formerly resided in Florida. At the time of her H&C application she was 97 years old. Her husband passed away in 2015.

[4] The Applicant has two children. Her son, Dr. Michael Freund [Dr. Freund] now resides in Halifax, Nova Scotia with his wife and their 23-year-old son. They are all Canadian citizens. The Applicant's daughter resides in the US but is unable to assist the Applicant because she suffers from her own medical illnesses.

[5] After the passing of her husband, the Applicant's memory began to deteriorate. She started to forget to take her medication, which ultimately had negative consequences on her health. At that time, Dr. Freund lived in Florida and was able to care for his mother. When the Applicant's condition worsened, she moved to an assisted living facility. Dr. Freund remained his mother's primary caregiver and support person.

[6] In 2018, Dr. Freund moved to Halifax to take on a position at Dalhousie University. Dr. Freund continued to be primarily responsible for his mother's care. He travelled to Florida every four months to check up on her. However, when Dr. Freund moved to Halifax the Applicant's health began to suffer and she developed preventable illnesses that had negative cognitive impacts on her health and overall quality of life.

[7] Dr. Freund, concerned for his mother's well-being and health, moved his mother to Halifax so he could provide more care and support. On August 18, 2018, the Applicant arrived in Canada as a visitor with temporary resident status. The Applicant now resides in a private assisted living facility close to Dr. Freund's home. Dr. Freund continues to monitor her health, coordinate her professional care, communicate with healthcare staff on her behalf, manage her medications, and do her errands. He also acts as her power of attorney. Since living in Halifax, the Applicant's health has improved.

[8] Dr. Freund and his spouse applied to sponsor the Applicant for permanent residence in the Family Class. They were ineligible to do so because, at the time of their application, they did not meet the income requirements pursuant to *IRPA*. They did not meet the income requirements because, having recently moved to Halifax, they did not possess notices of assessment from the Canada Revenue Agency for the three taxation years immediately preceding their sponsorship application.

[9] Accordingly, the Applicant applied for permanent residence on H&C grounds on June 22, 2020. While the H&C application was in process, the parent sponsorship lottery opened in October 2020. Dr. Freund applied because he now had his 2018, 2019, and 2020 notices of assessment. He was not selected. The H&C application became the only option for the Applicant to obtain permanent resident status.

[10] On March 25, 2021, Dr. Freund submitted an updated personal statement explaining how his mother's health and well-being have improved since moving to Canada. Dr. Freund's son

also provided a statement detailing his frequent visits with his grandmother. The Applicant's doctor also provided a letter recommending that the Applicant remain in Canada, especially in light of the COVID-19 pandemic.

III. The Decision

[11] The Officer refused the Applicant's H&C application.

[12] First, the Officer considered the Applicant's establishment. The Officer noted that there were no personal letters from friends in Canada or volunteer or community organizations displaying the Applicant's integration and active participation in Canadian society. The Officer acknowledged that the Applicant's age and health issues may have affected her establishment, but concluded that she had a limited level of establishment in Canada for someone residing in the country for a year-and-a-half.

[13] The Applicant requested an exemption for a potential medical inadmissibility under paragraph 38(1)(c) of the *IRPA*. However, the Officer found little evidence that the Applicant has been determined medically inadmissible.

[14] In considering hardship, the Officer found that the Applicant has stronger familial ties in Canada than she does in the US, and that she may experience hardship if she returns to the US. The Officer also accepted that the Applicant is reliant on Dr. Freund's care, he is her Power of Attorney, she has a special relationship with her grandson, she does not have other family members to care for her in the US, and that all of her friends in the US have passed away. The

Officer also acknowledged that her memory is deteriorating and that she requires significant daily assistance, which greatly improved her emotional and physical well-being.

[15] The Officer noted that the Applicant is not being removed nor is she facing deportation to the US. The Applicant had (at of the time of the Decision) valid temporary visitor status which she could extend if she wanted to stay in Canada. The Officer detailed other options for the Applicant to remain in Canada with her family, such as applying for a parent and grandparent Super Visa, which would be valid for ten years and would allow her to remain in Canada for two years at a time. The Officer recognized that the parents and grandparents program is subject to a lottery system and a limited number of applications are considered. However, the Officer concluded that this is an issue faced by many people. There was also no evidence that the Applicant's grandson has attempted to sponsor her through the family class.

[16] Finally, the Officer stated that the H&C application process is not an alternative to obtaining permanent residence and that the onus is on the Applicant to provide sufficient evidence that her circumstances warrant the granting of this exceptional measure. The Officer determined that the Applicant failed to justify the exceptional remedy of relief under subsection 25(1) of the *IRPA*.

IV. Issue and Standard of Review

[17] The only issue is whether the Decision is reasonable.

[18] Both parties agree that the standard of review applicable to H&C decisions made pursuant to subsection 25(1) of the *IRPA* is reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]). Such decisions are considered exceptional and highly discretionary and therefore warrant considerable deference from this Court (*Nguyen v Canada (Minister of Citizenship and Immigration)*, 2017 FC 27 at para 3).

[19] I agree with the parties that the appropriate standard of review is reasonableness. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] arise in this matter (at paras 16-17). A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification and whether the decision "is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86). In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87).

V. Analysis

[20] I find that the Officer's hardship analysis is unreasonable. This is enough to remit the Decision back to another officer.

[21] The Officer failed to engage with evidence showing hardship and failed to explain why the evidence was insufficient to meet the threshold for the granting of permanent residency on H&C grounds. As a result, I am unable to identify, in light of the record, the line of reasoning behind the Decision.

[22] While the Officer's reasons do, on its face, reference the evidence about the Applicant's health concerns should she return to the US, the reasons do not reflect the seriousness of the hardship as set out in this evidence. The evidence about the Applicant's health goes to the heart of her application. The Officer did not sufficiently engage with this evidence to justify or explain why the Applicant did not meet the threshold for H&C relief.

[23] The evidence before the Officer showed that the Applicant's health would have continued to decline had she remained in the US. The evidence also showed that, since being in Halifax, the Applicant's health and mobility have improved, as she has sufficient support necessary to recover from health issues. There was also evidence from Dr. Freund's son explaining the joy the family's visits brought to the Applicant and the fear that her return to the US would be traumatic to her. There was also evidence from the Applicant's family physician strongly recommending that the Applicant remain in Canada because of her complex medical issues.

[24] Rather than assessing the hardship that the Applicant's removal would have on her health, a significant part of the Officer's reasons focus on alternate immigration routes for the Applicant to remain in Canada:

> I note a large portion of the application concerns the possible separation between the applicant and her family members in

> Canada. However, I note the applicant is not being removed from Canada or facing deportation to the United States. I further note there is currently no removal order issued against the applicant. The applicant has valid temporary resident status as a visitor until 2021/08/17. I note the applicant always has the option to apply and further extend her stay, in order to remain in Canada with her son and his family.

[25] Madam Justice Sadrehashemi recently explained an officer's responsibility in considering H&C applications in *Bernabe v Canada (Citizenship and Immigration)*, 2022 FC 295 [*Bernabe*] at paragraph 19:

> Given that the purpose of humanitarian and compassionate discretion is to "mitigate the rigidity of the law in an appropriate case," there is no proscribed and limited set of factors that warrant relief (Kanthasamy at para 19). The factors warranting relief will vary depending on the circumstances, but "officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25; *Baker* at paras 74–75).
>
> [Emphasis added.]

[26] I agree with the Applicant that her position is supported by *Majkowski v Canada (Citizenship and Immigration)*, 2021 FC 582 [*Majkowski*]. In *Majkowski*, the Court set aside an officer's decision because they had failed to engage in any meaningful way with the applicant's particular circumstances, including his "advanced age, his level of dependency on his family, his vulnerability, and his potential isolation and hardship if he is required to re-establish himself in the [US]" (at para 21). *Majkowski* affirmed the finding of Mr. Justice Leblanc in *Epstein v Canada (Citizenship and Immigration)*, 2015 FC 1201 [*Epstein*] that an officer errs when they fail to consider an applicant's personal circumstances, particularly age and dependency on family in Canada (at para 11). Mr. Justice Leblanc also stated:

> [13] This Court has held that while immigration officers have discretion as to the weight assigned to an applicant's personal circumstances in H&C applications, officers cannot have any disregard for them. (*Kaur*, above at paras 18-19; *Koromila v Canada (Citizenship & Immigration)*, 2009 FC 393, at para 68 [*Koromila*]). This Court has also held that an immigration officer cannot ignore "significant evidence of an applicant's emotional and human dependency on her family in Canada" (*Koromila*, above at para 68). This is especially true where a fundamental change has occurred in an applicant's personal situation (*Le Blanc v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1292, at para 31 [*Le Blanc*]).
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> [Emphasis added.]

[27] Applying the principles of *Bernabe*, *Majkowski*, and *Epstein* to the present matter, I find that the Officer failed to substantively or meaningfully consider or engage with the evidence related to the personal circumstances of the Applicant. I agree with the Respondent that the Officer acknowledged and made direct references to information in the Applicant's submissions relaying her reliance on her family's care and the way in which her health improved since in Canada, in comparison to when she was in the US. However, there is a distinction to be made between an *acknowledgement* and a formal assessment of the hardship that an applicant may face to ensure that a Decision was reached in an intelligible and justifiable manner. I find that the Officer in the present matter acknowledged but did not assess the evidence of hardship.

[28] This can be observed in the following excerpt of the Decision:

> The applicant states her daughter and sister in the [US] are unable to care for her. She further states her friends in the [US have all passed away. I accept the applicant has a close relationship with her son, daughter-in-law, and grandson and that they appreciate having her in Canada. The applicant's son and grandson have both stated they visit the applicant regularly and help her out at the facility. When she was in the [US], it is stated that the applicant's son could only visit and assist her occasion. As a result, the

> applicant's health deteriorated and developed ailments which could have been avoided if she had her son's physical assistance. Therefore, I acknowledge the applicant has stronger familial ties in Canada as opposed to in the [US]. I also accept the applicant may experience hardship if she returns to the United States. As a result, I have given these considerations some weight.
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> [Emphasis added.]

[29] The Officer's reasons do not explain why the personal circumstances of the Applicant do not warrant an H&C exemption. Given the foregoing analysis, I find that the Officer's assessment of hardship renders this Decision unreasonable.

VI. Conclusion

[30] For all of these reasons, the application for judicial review is allowed. The parties do not propose a question for certification and none arises.

JUDGMENT in IMM-3250-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted to a different officer for re-determination.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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