Federal Court  Cour fédérale

Date: 20230426

Docket: IMM-355-21

Citation: 2023 FC 611

Ottawa, Ontario, April 26, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

RENATA BABIARZ

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Renata Babiarz ("Ms. Babiarz"), is a citizen of Poland who has lived in Canada for approximately 21 years. She applied for permanent residence based on humanitarian and compassionate grounds ("H & C Application") in April 2019. She received a temporary resident permit and an open work permit in April 2020 through a program at Immigration, Refugees and Citizenship Canada [IRCC] for those who have experienced family violence in Canada.

[2] A Senior Immigration Officer in the Humanitarian Migration Division at IRCC ("the Officer") refused Ms. Babiarz's H & C Application on January 5, 2021. She seeks judicial review of that refusal. Ms. Babiarz argues that the Officer unreasonably assessed her non-compliance with Canadian immigration laws and ignored evidence of her financial establishment.

[3] I agree that the Officer's assessment of her non-compliance with Canadian immigration laws is perfunctory and does not evaluate the nature of the non-compliance nor its relevance and weight in the context of other humanitarian and compassionate factors, as is required. This is unreasonable and requires that the application be remitted for redetermination.

[4] Based on the reasons below, I grant the application for judicial review.

II. Background

[5] Ms. Babiarz is a citizen of Poland. She came to Canada as a visitor over 21 years ago, in 2002, and has remained in Canada since then. Ms. Babiarz states that she initially overstayed her visitor visa so that she could work and provide financially for her adult daughter's medical needs in Poland. Ms. Babiarz's mother, who Ms. Babiarz claims to support financially, also remained in Poland. Throughout her time in Canada, Ms. Babiarz has worked as a cleaner through her own cleaning business.

[6] Ms. Babiarz has had two relationships in Canada that she describes as abusive: one early in her time in Canada and another beginning in 2016. The latter relationship was with a Canadian

permanent resident who Ms. Babiarz married in 2016. Ms. Babiarz describes several incidents where he reacted to minor disagreements by shouting, throwing things at Ms. Babiarz, and grabbing and pushing her. Ms. Babiarz developed significant situational stress and anxiety and began taking anti-anxiety medication. Her then-spouse submitted a sponsorship application on her behalf, then withdrew it. Shortly thereafter, he submitted a second sponsorship application on her behalf and then withdrew it once again. The marriage ended in 2019.

[7] Shortly after, Ms. Babiarz submitted an H & C Application. She also applied for a temporary resident permit and open work permit through an IRCC program for victims of family violence in Canada. Her temporary resident and open work permits were granted in April 2020. An Officer refused Ms. Babiarz's H & C Application on January 5, 2021.

III. Issue and Standard of Review

[8] The issues raised by Ms. Babiarz on judicial review relate to the Officer's evaluation of her establishment in Canada. The parties submit and I agree that I should review the Officer's decision on a reasonableness standard. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] described a reasonable decision as "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). Administrative decision-makers must ensure that their exercise of public power is "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95).

IV. Analysis

[9] Ms. Babiarz's non-compliance with immigration laws in overstaying and working without authorization is a central feature in the Officer's reasons. The Officer discounts the length of time she spent in Canada because much of it occurred when she did not have authorization to remain in the country. The Officer does not give Ms. Babiarz's 18 years in Canada "significant weight" because of this non-compliance. Further, the Officer finds that the non-compliance, namely overstaying her visa and working without authorization for approximately 15 years, "attracts significant negative weight" in the establishment analysis.

[10] As noted by Justice Walker in *Mitchell v Canada (Minister of Citizenship and Immigration)*, 2019 FC 190 [*Mitchell*], subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] "presupposes that an applicant has failed to comply with one or more of the provisions of the IRPA. Therefore, a decision-maker must assess the nature of the non-compliance and its relevance and weight against the applicant's H&C factors in each case" (*Mitchell* at para 23; see also *Trinidad v Canada (Minister of Citizenship and Immigration)*, 2023 FC 65 at paras 27-41; *Mateos de la Luz v Canada (Minister of Citizenship and Immigration)*, 2022 FC 599 at para 28).

[11] The Respondent argued that the Officer reasonably assessed Ms. Babiarz's non-compliance because officers are entitled to give negative weight to non-compliance and this was not the entirety of the Officer's establishment analysis. While it is certainly true that negative weight can be assigned to non-compliance, I do not agree that the Officer conducted the assessment required in considering Ms. Babiarz's non-compliance.

[12] There was no evaluation of the nature or the severity of the non-compliance, the circumstances leading to the non-compliance, nor how this non-compliance relates to the other factors raised in the application. The Officer made non-compliance the overriding consideration in the assessment without balancing other relevant factors raised. For example, though it is cursorily mentioned in the Officer's reasons, there is no substantive consideration of the spousal violence Ms. Babiarz experienced in Canada that led to the breakdown of her attempts to regularize her status through the spousal sponsorship program. This omission is particularly surprising given Ms. Babiarz's lengthy affidavit on this issue, the letters of support referring to the abuse, and that IRCC recently granted her temporary resident permit and open work permit applications because it accepted she had been a victim of family violence in Canada.

[13] Justice Lafrenière recently addressed this problem of assigning undue weight to non-compliance without justification in *Toussaint v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1146 at paragraph 23:

> Subsection 25(1) effectively presupposes a failure to comply with one or more provisions of the IRPA and is designed to provide relief from that non-compliance: Mitchell v Canada (Citizenship and Immigration), 2019 FC 190 at para 23. In my view, it was contrary to this need for balancing and therefore unreasonable for the Officer to conflate and repeatedly discount positive H&C factors related to the Applicant's establishment because of non-compliance.

[14] The same reasoning applies to this case. The Officer's treatment of Ms. Babiarz's non-compliance is not a minor misstep in the decision. I find the Officer's view of the non-

compliance is an overriding feature in the reasoning. This is a sufficient basis to set aside the decision. Neither party raised a question for certification and I agree that none arises.

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of IRCC dated January 5, 2021, is set aside and sent back to a different officer for redetermination; and

3. No serious question of general importance is certified.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Me Kathryn Lynch	FOR THE APPLICANT
Me Kevin Spykerman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

South Etobicoke Community Legal Services Toronto, (Ontario)	FOR THE APPLICANT
Attorney General of Canada (Department of Justice Canada) Toronto (Ontario)	FOR THE RESPONDENT