Federal Court Cour fédérale

**Date: 20231026**

**Docket: IMM-421-22**

**Citation: 2023 FC 1427**

**Ottawa, Ontario, October 26, 2023**

**PRESENT: The Honourable Mr. Justice Régimbald**

**BETWEEN:**

**AMAL FARHAT**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Amal Farhat, is a middle-aged Lebanese grandmother seeking permanent resident status on humanitarian and compassionate [H&C] grounds. She based her application on her establishment in Canada, the best interests of her grandchild of whom she is a significant caregiver, and the hardship she claims she would face upon her return to Lebanon, her home country.

[2] Her application was refused by a Senior Immigration Officer [the Officer]. In the Officer's view, the Applicant was not sufficiently established in Canada, would not suffer unusual harm if she returned to Lebanon, and the best interests of her granddaughter were not sufficiently engaged to warrant H&C relief.

[3] The Applicant seeks judicial review of that decision. Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicant has discharged her burden and demonstrated that the Officer's decision was unreasonable. For the reasons that follow, this application for judicial review is allowed.

## II. Facts

[4] The Applicant, at the time of her H&C application, was 56 years old. She is a Lebanese citizen living with her son, his wife, and their daughter in Windsor, Ontario. She also has three siblings in Canada who reside in Ottawa, Ontario, and Gatineau, Québec, and who have children of their own. Before the pandemic, the Applicant visited her siblings regularly. She has been divorced for over 20 years and no longer has any close family in Lebanon.

[5] In March of 2018, the Applicant applied for permanent residency on H&C grounds, which application was rejected in March of 2020. She submitted another application in April of 2021, after the birth of her granddaughter and in the midst of the COVID-19 pandemic. That application was refused in January of 2022, and forms the basis of this judicial review.

[6] The Applicant is supported financially by her son, but contributes to the household by taking care of her son's daughter, her granddaughter, who was born in January of 2020. At the time of her current H&C application, the Applicant's son and his wife were expecting another child whom the Applicant looked forward to caring for.

[7] The Applicant cannot work in Canada, but in addition to caring for her granddaughter, she has become involved in her local community, primarily through the mosque that she attends. She also has a history of medical issues: several years back she had breast cancer, and she is currently a type-II diabetic, taking three different medications for her condition.

## III. The Decision Under Review

[8] The Officer rejected the Applicant's H&C request in consideration of (1) her establishment in Canada, (2) the best interests of the child [BIOC], her granddaughter, and (3) the hardship that she would suffer upon return to Lebanon. The Officer stated that these factors were considered cumulatively.

### A. *Establishment in Canada*

[9] The Officer acknowledged that the Applicant was dependent on her family in Canada and wanted to stay close to them, and noted the absence of family members in Lebanon.

[10] The Officer "[commended] the applicant's efforts towards a civic integration over an extended period of time by practising religious observance, engaging in volunteerism, and

forming social networks." However, the Officer also stated that this was only the "typical level of establishment for a person in similar circumstances."

[11] The Officer noted that the Applicant had greater family ties in Canada than in Lebanon. Yet, the Officer pointed out that the Applicant "was cognizant that long-term separation from [her family] could ensue." Furthermore, the Officer was not convinced that removal to Lebanon "would harm the family dynamic that [had] been established and maintained over the many years [the Applicant] had lived apart from [her family]."

[12] Finally, the Officer pointed out that familial separation was an inherent and not unusual consequence of being required to leave Canada at the end of an authorized stay.

B. *Best interests of the child*

[13] The Officer recognized that the Applicant had forged an emotional attachment to her granddaughter by caring for her since her birth, and largely in lieu of her parents who were able to focus on their careers. The Officer recognized that putting an end to this would not be ideal, but noted that parents working full-time and finding non-family care for their children is common in Canada. Further, the Officer found that the granddaughter was not "wholly dependent" on the Applicant, and that there was insufficient evidence to show that the Applicant's return to Lebanon would compromise her granddaughter's best interests.

C. *Hardship upon return to Lebanon*

[14] The Officer noted that the economic situation in Lebanon was worse than in Canada, but stated that "tasks such as finding employment and realizing financial security are incidental to this process." The Officer also considered that Canada is a better place for a woman to live than Lebanon and that discrimination existed in a number of areas in that country. However, the Officer was not ultimately convinced that any discrimination the Applicant would face in Lebanon would warrant H&C relief.

[15] The Officer also considered the impact of the COVID-19 pandemic, as well as the Applicant's type-II diabetes. The Officer dismissed the pandemic, since every country had been affected, and dismissed the Applicant's diabetes, because she "[had] not provided sufficient objective evidence to establish, on balance" her inability to get the medicine she would need.

IV. Issues and Standard of Review

[16] The only issue before this Court is whether the Officer's decision was reasonable.

[17] The standard of review on the merits of the Officer's H&C decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at paras 7, 39-44). The focus on reasonableness review is "the decision actually made by the decision maker, including… the reasoning process and the outcome" (*Vavilov* at para 83). 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; *Mason* at para 8). To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99; *Mason* at para 59). Reasonableness review is not a "rubber-stamping" exercise; it is a robust form of review (*Vavilov* at para 13; *Mason* at para 63). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126; *Mason* at para 73). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

## V. Analysis

### A. *The test for relief on humanitarian and compassionate grounds*

[18] Subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] grants the Minister significant discretionary power to exempt a foreigner from having to meet the regular criteria or obligations under the IRPA. An applicant may receive permanent resident status if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations. The onus to convince the Minister lies with the applicant (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45). To do this, the applicant must demonstrate circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at p 350).

[19] This is not a low bar, and "[t]here will inevitably be some hardship associated with being required to leave Canada" (*Kanthasamy* at para 23). An applicant must demonstrate "exceptional reasons as to why they should be allowed to remain in Canada or allowed to obtain H&C relief from abroad" (*Huang v Canada (Citizenship and Immigration*), 2019 FC 265 [*Huang*] at para 20, citing *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para 90). An applicant must therefore establish that they would face misfortunes or other exceptional circumstances (including H&C considerations) that are greater or relative to others who apply for permanent residence in Canada or abroad (*Huang* at paras 19-20, citing *Jesuthasan v Canada (Citizenship and Immigration)*, 2018 FC 142 at paras 49 and 57; *Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327 at para 67). As stated in *Kanthasamy*, H&C relief aims at addressing situations that "might fall with much more force on some persons… than on others, because of their particular circumstances…" (at para 15). Without this, subsection 25(1) of the IRPA risks becoming an alternative immigration scheme, contrary to Parliament's intent when it was enacted (*Kanthasamy* at para 23; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16).

[20] In assessing H&C applications under subsection 25(1) of the IRPA, officers must consider all relevant facts and factors advanced (*Kanthasamy* at para 25) in a way that permits them "to respond more flexibly to the equitable goals of the provision" (at para 33). This means that the applicant's circumstances must be evaluated globally, as a whole, and relevant considerations must be weighed cumulatively (at paras 25, 28, 45, 60). In other words, no element needs to be determinative on its own. Indeed, the words "unusual and undeserved or disproportionate hardship" are instructive, but not determinative (at para 33).

[21] An important consideration in the H&C analysis is the best interests of a child directly affected. As stated in *Kanthasamy* at paragraphs 34-41, this factor is "'highly contextual' because of the 'multitude of factors that may impinge on the child's best interest'," and the analysis must be responsive to each child's connection with family members, particular age, capacity, needs, maturity and development. The officer must be attentive to the child's best opportunity for care and attention. Moreover, as conceded by the Respondent during the hearing, cultural, linguistic and religious grounds are also relevant in determining the best interests of the child, in relation to the child's development and education.

[22] Finally, in considering whether H&C relief is warranted, the officer must consider the factors in the country of origin, including medical inadequacies and potential discrimination. On any alleged issue of discrimination, the applicant only needs to show that it is likely that discrimination will occur, and that such a conclusion may be inferred (*Kanthasamy* at paras 52-54, 56).

B. *The Officer's decision is unreasonable because it does not show a global assessment of all relevant factors*

[23] The Applicant relies on *Kanthasamy* and claims that the Officer did not consider "humanitarian and compassionate factors in the broader sense" (see *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33) and failed to weigh all of the relevant factors together (*Kanthasamy* at para 25; *Baker v Canada (Minister of Citizenship and Immigration)*, 174 DLR (4th) 193 [*Baker*] at paras 74-75). Specifically, the Officer did not rely on all of the information in the Applicant's statutory declaration.

[24] The Applicant further claims that the Officer's comments about hardship in leaving being "an ordinary consequence of return" evince a generalized approach to the H&C analysis, instead of an evaluation of the Applicant's evidence as a whole as required by *Kanthasamy*. This generalized approach ultimately made the Applicant's particular circumstances meaningless in the overall analysis.

[25] The Respondent argues that the Officer considered all of the evidence and, in weighing the relevant factors, including the best interests of the child, determined that the Applicant had not met her burden to demonstrate that H&C relief was warranted in the circumstances.

[26] In my view, in the circumstances of this case, the Officer did not reasonably evaluate the H&C considerations, nor weigh them globally, cumulatively and as a whole, as required by *Kanthasamy*.

(1) Establishment in Canada

[27] The Applicant claims that the Officer's assessment of her establishment in Canada and opining that it was "typical" of other individuals in a similar situation belie the requirement of extraordinary establishment. Moreover, the Officer did not provide reasons as to what additional degree of establishment would have been "enough" to meet the requirement imposed. Importantly, the requirements for exceptional hardship or establishment have consistently been found to be unreasonable by this Court (*Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 [*Zhang*] at paras 27-28; *Subar v Canada (Citizenship and Immigration)*, 2022 FC 340, at para 28; *Peter v Canada (Citizenship and Immigration)*, 2022 FC 208, at para 1).

[28] The Respondent argues that the Officer reasonably determined that the Applicant's establishment was typical of a person in similar circumstances and did not require exceptional establishment. Rather, the Officer simply found that the establishment was not sufficient to grant the H&C exemption.

[29] In my view, the Officer did compare the Applicant's circumstances to those "typical" of others in her situation. An analysis requiring exceptional establishment which translates into a stringent threshold for relief was explicitly rejected in *Kanthasamy* (at paras 13-14, 106-107; *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 20-21). In *Zhang*, Justice Zinn explained that a comparative analysis was not required:

> [23] There is a significant difference between observing that this exceptional relief is provided for <u>because</u> the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available <u>only to those who demonstrate</u> the existence of misfortunes or other circumstances that are <u>exceptional relative to others</u>. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there.
>
> [24] Once the exception is established in law, as it is in subsection 25(1), it is available to all but will only be granted to those whose particular circumstances excite in a reasonable person in a civilized community a desire to relieve their misfortunes. It requires only an examination of the personal circumstances of an applicant. It does not require that a comparative analysis be done.
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> [Emphasis in original.]

[30] To be clear, comparing an applicant's situation with others in a similar situation is not always prohibited (see *Bhujel v Canada (Citizenship and Immigration)*, 2023 FC 828 at paras 52-57). However, the officer comparing an applicant's situation with others must remain alive to

the fact-specific exercise that is being conducted “as a whole,” and the officer must not require exceptional establishment. As *Zhang* makes clear, comparison must not supplant the real test, which is a contextual search for circumstances that excite in a reasonable person, in a civilized community, the desire to relieve the misfortune of another (at paras 28-29).

[31] In this case, by contrast, there is no indication whatsoever from the Officer’s reasons that any positive weight was given to the Applicant’s establishment in Canada—her establishment was simply deemed “not uncharacteristic” and “typical” and dismissed. The Officer’s establishment analysis was unreasonable because it turned on a search for exceptionality, which supplanted the use of the proper test. While the Applicant’s establishment may have been “typical,” the Officer failed to explain “what more” could have been reasonably expected of the Applicant, in her particular circumstances, for her establishment to be deemed worthy of consideration.

[32] However, I disagree with the Applicant’s claim that the Officer was unreasonable for mentioning “the familial separation that would ensue” as being “an inherent rather than an unusual consequence” of being required to leave Canada. The Officer’s statement is consistent with the reminder in *Kanthasamy* that “there will inevitably be some hardship associated with being required to leave Canada” (at para 23). Having family in Canada is not a one-way ticket to permanent residency.

[33] In the end, the Officer’s analysis requiring an exceptional establishment is unreasonable. The Officer commended the Applicant for her establishment, but then dismissed it as “not

uncharacteristic" and "typical" when comparing it with others in similar circumstances. The Officer introduced an implicit exceptional establishment threshold that is not required.

(2) Hardship and factors in Lebanon

[34] The Applicant claims that the Officer failed to appreciate a medical doctor's report explaining that the Applicant's mental health would deteriorate if she had to leave Canada, and that this deterioration would result from isolation (the Applicant has no remaining family in Lebanon), a difficult economic and political situation, and a lack of psychiatric support.

[35] The Applicant argues that the Officer minimized the hardship, describing it as "some emotional upset" and that the "family dynamic" would not be harmed, stating that the Applicant should have known that she would be separated from her family when they moved to Canada. However, the Officer failed to assess the hardship resulting from the Applicant having to return and live alone, because her only son and extended family all live in Canada. Finally, the Officer failed to consider the hardship resulting from the Applicant being not only a woman, but a divorced woman, given that this is a unique cause for discrimination in Lebanon.

[36] The Respondent, by contrast, maintains the reasonableness of the Officer's findings. The family dynamic would not be harmed and separation was an inherent rather than unusual consequence of being required to leave Canada. The Respondent also notes that the doctor's note does not establish a specific diagnosis, but is rather a generic letter of support.

[37] In my view, the Officer failed to properly consider the Applicant's personal circumstances as a whole and how they would impact her hardship upon return to Lebanon.

[38] For example, the Officer dismissed the potential mental issues as being essentially minimal and anticipated, given that the Applicant knew or ought to have known that she would live separated from her son when he left for Canada, and that the departure is not an unusual consequence of having to leave Canada at then end of her status as a temporary resident. In doing so, the Officer failed to assess the lack of any close family in Lebanon. Stating that her family linkage in Canada is "greater relative to those found in Lebanon" implies that she actually had close family ties in Lebanon. In fact, she did not.

[39] The Officer also considered the Applicant's claim that she would face discrimination in Lebanon, including as a divorced woman, and recognized that women face discrimination in a number of areas. The Officer then dismissed this factor as not sufficient to rise to a level that would warrant relief, acknowledging discrimination and disadvantage "as a result of… gender." The Applicant, however, claimed that her divorced status aggravated her risk of persecution in addition to her gender. The Officer's reasons do not show proper consideration of this factor.

[40] The Officer considered the mental issues upon return, the fact that there were no close family members remaining in Lebanon, and the discrimination that she was likely to face. Yet, these considerations were made in silos, and the Officer ought to have considered and assessed all of these individual facts together, to determine whether they "would excite in a reasonable

[person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at paras 21, 25).

[41] Having failed to perform a proper, wholesome assessment, the Officer's decision is unreasonable in this regard.

(3) Best interests of the child

[42] The Applicant argues that the Officer's BIOC analysis was not consistent with the Supreme Court of Canada's guidance in *Kanthasamy*, as well as recent instruction from this Court in *Motrichko v Canada (Citizenship and Immigration)*, 2017 FC 516 [*Motrichko*]. Specifically, the grandchild's best interests should have been given substantial weight (*Kanthasamy* at para 38; *Motrichko* at para 19), and they should have been the subject of a contextual analysis (*Kanthasamy* at para 35; *Motrichko* at para 21).

[43] The Officer's reasons admit that the Applicant's presence "would be beneficial" to her granddaughter because she "forged an emotional attachment," but set the threshold too high in relying on the fact that the granddaughter was not "wholly dependent" on the Applicant. Moreover, the Officer opined that the Applicant's involvement in providing childcare for her granddaughter was not sufficient because finding childcare "is quite common in Canada and would not be considered unusual."

[44] The Respondent argues that the Officer appropriately considered the BIOC. There is no evidence that the granddaughter's development or emotional well-being would be at risk should

the Applicant return to Lebanon. The Officer properly considered the level of dependency between the granddaughter and the Applicant and gave weight to the extent to which the Applicant had assisted in her care and upbringing. Having weighed the evidence, the Officer held that there was insufficient objective evidence to establish that the Applicant's return to Lebanon would compromise the child's best interests.

[45] In my view, the Officer, in concluding that making new childcare arrangements would not be unusual, failed to properly assess the best interest of the grandchild, employing instead a standard of avoiding "undue harm." The Officer also appears to have evaluated the hardship from the parents' perspective. This Court has held in *Narula v Canada (Citizenship and Immigration)*, 2021 FC 1423 [*Narula*] at paragraphs 35-36 that the concept of "undue hardship" is ill suited to assessing hardship for a child. To say that a child's best interests are met by avoiding "undue harm" is to misunderstand the word "best." Instead, the officer must evaluate the best interests of the child, after a proper identification and definition of those interests.

[46] The Officer in this case had to assess the needs of the child, according to her age, capacity, needs, maturity, and development (*Kanthasamy* at paras 35-36). In this particular case, the evidence demonstrates that the Applicant was an important part of the child's development, as she was the main caregiver when the parents were at work or at school. The Officer dismissed the evidence, stating that finding childcare is normal in the circumstances. In doing so, the Officer focused on the parents, and how they benefitted from the Applicant's help. There was little assessment of the interest of the granddaughter and how beneficial it was for the child to have her grandmother providing her daycare.

[47] More importantly, the Officer failed to consider the grandchild's best interests in her emotional, cultural, linguistic and religious development. Regular childcare arrangements in Canada do not necessarily cater to specific cultural, linguistic and religious considerations and, as conceded by the Respondent, those elements were relevant in the Officer's considerations. The Officer therefore had to weigh these considerations contextually in determining whether or not the best interests of the grandchild required that her grandmother be allowed to continue to provide her daycare.

[48] In *Motrichko,* Justice LeBlanc held that:

> [21] […] In order to resist judicial scrutiny, these interests need to be "well identified and defined" and must be examined by the officer "with a great deal of attention in light of all the evidence", although immigration officers, in so doing, are not required to adhere to a specific formula. Ultimately, the officer must be "alert, alive and sensitive" to these interests in what is a "highly contextual" analysis because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy*, at paras 35 and 38-39; *Baker*, at para 75; *Richard v Canada (Citizenship and Immigration)*, 2016 FC 1420, at para 16). However, the BIOC factor will not always outweigh other considerations or mean, when it is given consideration, that there will not be other reasons for denying an H&C application (*Baker*, at para 75).
>
> […]
>
> [27] […] the analysis the Officer was called upon to undertake was not whether the grandchildren would manage or survive in the absence of their grandmother but how they would be impacted, both practically and emotionally, by the departure of the Applicant in the particular circumstances of the case. To that end, the interests of each grandchild […] needed to be "well identified and defined" and examined, "with a great deal of attention." The Officer's BIOC analysis falls well short of this standard […]

[49] In this case, the Officer had to consider the particular needs of the child and determine whether those needs were better served by granting an H&C exemption to the Applicant, or whether those interests would not be compromised by her departure in the particular circumstances of the case. The Officer's failure to do so and his approach was unreasonable (*Kanthasamy* at para 39; *Baker* at para 75; *Narula* at paras 35-36).

## VI. Conclusion

[50] The Officer's decision did not assess and weigh the applicable factors globally, in the specific context of the Applicant's circumstances. The Officer's reasons are inconsistent with the established H&C principles.

[51] In the circumstances, the application for judicial review is allowed.

[52] The parties do not propose a question of general importance, and I agree that none arise. No question will be certified.

**JUDGMENT in IMM-421-22**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is allowed.

2. There is no question of general importance for certification.

"Guy Régimbald"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-421-22 |
| **STYLE OF CAUSE:** | AMAL FARHAT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
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| **DATED:** | OCTOBER 26, 2023 |

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