Federal Court  Cour fédérale

Date: 20240312

Docket: IMM-4408-23

Citation: 2024 FC 414

Ottawa, Ontario, March 12, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MELANESE IMONE CRYSTAL JOSEPH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review brought pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("the Act"). The Applicant is challenging the decision of an Immigration Officer to reject her application for an exemption to the requirements to seek permanent residence from outside the country in view of humanitarian and compassionate ("H&C") grounds, pursuant to s. 25 of the *Act* [Decision under Review]. The sole issue before this Court is whether the decision is reasonable.

[2] For the reasons that follow, the application for judicial review is dismissed.

I. Facts

[3] The Applicant is a 31-year-old citizen of Saint Vincent and the Grenadines who arrived in Canada on December 18, 2011, and has been living without status since that date. Since 2013, the Applicant supports herself as she has been working as a cook for a catering company.

[4] The Applicant's mother, two half-sisters and a cousin live in Canada. Her father, another half-sister and an aunt live in Saint Vincent and the Grenadines. Her youngest half-sister in Canada, who was thirteen years old at the time of the submission of the H&C application, is diagnosed with sickle cell disease. According to the Applicant, she helps her mother care for her younger sister's healthcare needs. However, they do not share the same household. Since 2016, the Applicant has been living with her cousin.

[5] The factors raised by the Applicant to be exempted from the requirements of the *Act* are her establishment in Canada and the best interests of a child, in the circumstances of this case her half-sister. In a decision dated March 14, 2022, an Immigration Officer rejected the application, finding that the factors raised by the Applicant were insufficient to grant an H&C exemption.

II. The Decision under Review

[6] The factors were considered by the decision maker and they were determined to be insufficient to grant an exemption on humanitarian and compassionate grounds. The Immigration Officer considered and weighed the factors raised by the Applicant. The Officer first looked at

the Applicant's level of establishment in Canada, assigning little weight to this factor. The Officer noted that, though the Applicant had spent over 10 years in Canada, she had spent the first 18 years of her life in Saint Vincent and the Grenadines, where she had completed high school and started community college. Thus, the Applicant is knowledgeable about the culture, language and traditions of her home country. In addition, the Officer gave little weight to the Applicant's professional integration as evidence of establishment, because she had worked since 2013 without a work permit, and there was "little evidence that she tried to regularize her legal status in Canada" (Decision under Review at p 3).

[7] Further, the Officer also gave little weight to the Applicant's involvement in her religious community, as there was no evidence that she would be unable to form such community ties in her home country. As it pertained to social ties in the community, the Officer recognized that the Applicant had formed friendships during her time in Canada, but concluded that such friendships could be maintained with the help of modern communication technology.

[8] The Officer then gave neutral weight to the Applicant's family ties in Canada, as the Applicant's family members are split between Canada and Saint Vincent and the Grenadines. Little weight was given to the Applicant's financial support of her family in Saint Vincent and the Grenadines, as there was a lack of evidence of regular financial contributions. While recognizing that departing Canada would be challenging, the Officer found it would be mitigated by familial support and her connection to her home country.

[9] The Officer then moved on to assessing the best interests of the child ("BIOC"), that is her thirteen-year-old sister, and assigned moderate weight to this factor. While the Officer

recognized that the Applicant has a close relationship with her sister, he found that the sister had a sufficient support system so as not to be negatively impacted by the Applicant's departure. In particular, the Officer highlighted that the Applicant had lived separately from her sister since 2016. The Officer also noted that the Applicant's sister's health does not prevent her from attending school regularly and forming social ties, and she has the required support for managing her health condition in that environment. He concluded that the Applicant's sister was receiving sufficient support from her mother and her community.

[10] Having considered all of the factors raised by the Applicant, the Officer globally assigned them moderate weight and concluded that there were insufficient H&C grounds to justify granting an exemption pursuant to section 25 of the *Act*.

III. New Evidence before the Court

[11] As part of her application record, the Applicant filed an affidavit sworn by a staff member at her counsel's firm that introduced an exhibit that was not before the Immigration Officer. The exhibit is an article pertaining to racism faced by people of colour who are diagnosed with sickle cell disease. This new evidence is inadmissible.

[12] The general rule is "that the evidentiary record for purposes of a judicial review application is restricted to that which was before the decision-maker" (*Devadawson v Canada (Citizenship and Immigration)*, 2015 FC 80 at para 31, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 FTR 297 at para 19 [*Access Copyright*]). This goes to the fundamental nature of judicial

review, which is to review the legality of an administrative decision by looking at the evidence that was actually considered by the decision maker (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263, 479 NR 189 at para 17 [*Bernard*], citing *Access Copyright* at para 17–19).

[13] This new evidence does not fit any of the recognized exceptions to this general rule. It does not fit the background information exception, because it is not being used as a means to explain the contents of the existing record to the Court (*Bernard* at para 20). It does not fit the "absence of evidence" exception, which consists of an affidavit to confirm the absence of evidence. The very purpose of the affidavit in our case is to introduce new evidence that was not before the decision-maker (*Bernard* at para 24). It also does not fit the exception related to procedural fairness or natural justice, as the Applicant is only challenging the reasonableness of the Immigration Officer's decision (*Bernard* at para 25).

[14] Therefore, the Court will not consider this new evidence.

IV. The Hearing

[15] Counsel for the Applicant was not present when the case was called. The Registry Officer attempted to get in touch with counsel, and his office, in order to ascertain if counsel intended to attend. To no avail. Following a discussion with counsel for the Respondent some 30 minutes later, it was resolved that the case would be heard on the basis of the written submissions from counsel (a seven-page memorandum of fact and law and a three-page reply), in accordance with Rule 38 of the *Federal Courts Rules*, SOR/98-106. The Court was satisfied that counsel for the

Applicant was duly given notice of the hearing, as he had acknowledged receipt of the leave being granted.

[16] Counsel for the Respondent was invited to make her submissions, which basically followed her memorandum of fact and law. In the best tradition of counsel representing the Crown (*Boucher v The Queen*, [1955] SCR 16), counsel's submissions were subdued and purely factual, in line with the record before the Court. The submissions took a few minutes.

[17] Instead of concluding the hearing, and with a view to protect, as best as possible, the possibility for the Applicant to make oral submissions to supplement the written record, if counsel were to appear before the end of the allotted time for the hearing, the Court recessed until after 10:30am. The Court took the view that it is preferable to receive oral submissions, even if they are made late. Providing an opportunity to address the Court may not be essential, but an applicant should not be prejudiced by the late arrival of counsel.

[18] Fortunately, counsel appeared before the Court shortly after 10:30am. He was afforded the possibility to make his oral submissions after being advised of what had taken place in the preceding hour.

[19] Accordingly, counsel for the Applicant was allowed to address the Court in spite of the fact that counsel for the Crown had already completed her submissions. Counsel for the Applicant focused his submissions on the best interests of the child, the Applicant's half-sister. Counsel argued that the decision maker should have inquired and conducted some extraneous

research on the illness that afflicts the half-sister. The Court reminded counsel that evidence had to be supplied, which was not the case here, and that, at any rate, extraneous research was to be discouraged in view of the principles of natural justice which call for a litigant to participate fully in the case brought to adjudication.

[20] As for the Applicant's establishment in Canada, counsel rested on his written submissions.

[21] In the end, the case of the Applicant boils down to establishment in Canada for a period of almost ten years and the best interests of the Applicant's half-sister.

V. Arguments and Analysis

[22] The applicable standard of review is reasonableness. The Applicant bears the onus to demonstrate the unreasonableness of the decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 at para 100 [*Vavilov*]). A decision must be reasonable in both its rationale and its outcome (*Vavilov* at para 15). 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).

[23] The Applicant's primary argument is that the Immigration Officer's decision is unreasonable because it fails to consider the impacts of racial bias faced by the Applicant's sister due to her sickle cell disease diagnosis. However, as noted by the Respondent, there is no mention of this factor in any of the supporting documents submitted with the H&C application. It

is on the basis of the excluded evidence, which was not before the decision-maker, that this argument is made. In essence, the Applicant is arguing that it was unreasonable for the Officer not to have considered evidence that did not form part of the record.

[24] It is a fundamental principle of administrative law that the "role of the Court on judicial review is to assess the reasonableness of an administrative decision based on the evidence and submissions presented to the decision maker" (*Madureira v Canada (Citizenship and Immigration*), 2023 FC 211 at para 15, citing *Vavilov* at paras 125–128; *Access Copyright* at paras 14–18). Thus, the general rule is that new arguments or new evidence cannot be raised on judicial review. As elaborated above, the evidence presented by the Applicant does not fit one of the recognized exceptions to that rule. Therefore, the Applicant's argument on racial bias must be rejected. The Immigration Officer cannot have been expected to address issues that did not form part of the record.

[25] The Applicant further argues that the Officer's decision fails to consider the emotional support that the Applicant provides to her sister, and which cannot be replicated by digital communication.

[26] Decision makers must be alert, alive and sensitive to the BIOC while assessing an H&C application (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 at para 38–40 [*Kanthasamy*]; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] 4 FC 358 at para 12 [*Legault*]). This requires an officer to identify and define the interests of the child and examine them in detail in light of the evidence in each case (*Kanthasamy* at para 39, citing *Legault* at paras 12, 31; *Kolosovs v Canada (Citizenship and*

Immigration), 2008 FC 165, 323 FTR 181, at paras. 9–12). However, this Court "has rejected the notion that consideration of the BIOC simply requires that the officer determine whether the child's best interests favours non-removal, as this will almost always be the case" (*Meniuk v Canada (Citizenship and Immigration)*, 2021 FC 1374 at para 26, citing *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at para 22; *Garraway v. Canada (Immigration, Refugees and Citizenship*), 2017 FC 286 at para 46). Rather, it is "but one factor that must be weighed together with all other relevant factors" (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360 at para 24).

[27] In the present case, the Immigration Officer came to a reasonable conclusion on the BIOC of the Applicant's sister. In fact, the decision explicitly recognized that the Applicant "is a source of emotional and psychological support for [her sister]" (Decision under review at p 5). However, this was weighed against the fact that the Applicant had lived separately from her sister since 2016. Furthermore, the Applicant's sister is able to attend school normally with the necessary medical support systems in place. Indeed, the Applicant's sister benefits from the support of her mother and her community.

[28] The Applicant also argues that the Officer unreasonably gave little weight to her professional integration in Canada. In particular, the Applicant stated that she "would much rather work on a valid status but was not well informed on the way to success until she found the possibility of an H&C application" (Applicant's Reply at para 25).

[29] As set out by the Supreme Court of Canada in *Kanthasamy*, H&C exemptions are not meant to create an alternative immigration scheme (para 23). The nature of the *Act* remains

essentially exclusionary. The exemption is for the circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortune of another" (*Kanthasamy*, para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970) 4 I.A.C. 338 [*Chirwa*]). The purpose of section 25 is to mitigate the rigidity of the legislative scheme in cases where it would be appropriate. But the *Chirwa* test seeks to prevent "undue overbreadth" (*Kanthasamy* at para 14). There is no doubt that leaving Canada brings inevitably some hardship. However, that "alone will not be generally sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (*Kanthasamy* at para 23).

[30] The Immigration Officer did not commit a reviewable error in attributing little weight to the Applicant's professional integration and drawing a negative inference from her choice to work without authorization. The record in this case shows no evidence of the Applicant attempting to regularize her status during the nearly ten years between her arrival in Canada and the submission of her H&C application. This Court has recognized that, in situations where an applicant did not make attempts to regularize their status or worked for the majority of their stay without status, an Officer is open "in the exercise of his or her discretion to minimize the Applicant's establishment in Canada" (*Mack v Canada (Citizenship and Immigration)*, 2017 FC 98 at para 14; See also *Zlotosz* at para 34). Therefore, it was reasonable to attribute little weight to this factor in the global assessment of the H&C application. The best interests of the Applicant's half-sister would of course be better served if the Applicant were to remain in this country. However, it cannot be said that the Applicant's presence is in any way critical because the child would be directly affected in view of the record presented to the decision maker.

VI. Conclusion

[31] The Court finds that the Applicant has failed to demonstrate that the decision under review is unreasonable. Therefore, this application for judicial review is dismissed.

[32] The parties did not ask the Court to certify a question in accordance with section 74 of the *Act*. The Court agrees that no such question emerged from this case.

JUDGMENT in IMM-4408-23

THIS COURT'S JUDGMENT is that

1. The judicial review application is dismissed.

2. There is no question to be certified pursuant to section 74 of the Act.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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