

Federal Court



Cour fédérale

Date: 20250415

Docket: IMM-10172-23

Citation: 2025 FC 694

Toronto, Ontario, April 15, 2025

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

GRACE MABENA

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Grace Mabena [Applicant], came to Canada from South Africa on a temporary resident visa in January 2020 and married a Canadian permanent resident [Husband] with whom she had been in a long-term relationship. After enduring over three years of physical, emotional and psychological abuse, the Applicant left her Husband and sought refuge

in a women's shelter. She converted her application for permanent residence into an application based on humanitarian and compassionate [H&C] grounds [H&C Application].

[2] By decision dated July 26, 2023 [Decision], a senior immigration officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC] refused the Applicant's H&C Application. The Officer gave "some weight" to factors related to the Applicant's establishment in Canada and circumstances of family violence, but gave "little" weight to the hardship that the Applicant claimed she would face if she were forced to return to South Africa. The Officer concluded that the Applicant's desire to live in Canada was not a sufficient reason to allow her to remain in the country.

[3] The Applicant seeks judicial review of the Decision.

[4] For the reasons that follow, I am allowing this application as I find that the Officer's Decision is unreasonable in its assessment of the factors of family violence and hardship. While the Officer accepted that the Applicant had been the victim of domestic abuse and that the Applicant's Husband used his spousal sponsorship to control her, the Officer gave inadequate consideration to these important circumstances in the global assessment of H&C considerations. The Officer's failure to do so has the perverse effect of allowing spousal sponsorship within the immigration system to be used as a sword in a system meant to shield claimants from harm.

II. Facts

[5] The Applicant married her Husband on January 31, 2020. In May 2020, the Husband sponsored the Applicant's application for permanent residency. Throughout their marriage, the Husband repeatedly threatened to withdraw his sponsorship, and in 2022, he withdrew his sponsorship only to reinstate it weeks later.

[6] The Applicant's marriage was punctuated with abuse. In her letter to IRCC converting her spousal sponsorship application to an H&C Application, the Applicant details seven incidents of physical violence that she endured in the period between April 2020 through May 2023. The violence was perpetrated by her Husband as well as his children from another relationship. In May 2023, the Applicant left her Husband and moved into a women's shelter.

[7] The Applicant is highly educated, having received her Master in Business Administration from Reading University in October 2021. She has been gainfully employed since she arrived in Canada, and at the time of her H&C Application, she was working as a national client manager at a marketing company who provided a letter of support for her H&C Application.

[8] The Applicant has been HIV positive since 2013 and fears that if she is forced to return to South Africa, she will not be able to afford her medication as she liquidated all her assets when she left South Africa and has no prospect of employment there.

III. Issues and Standard of Review

[9] The only issue for review is whether the Decision is reasonable. The Applicant submits that the Officer failed to give weight to all relevant H&C considerations in her case. She specifically raises the following errors, which she submits render the Decision unreasonable:

- A. The Officer failed to give proper consideration to the factor of family violence; and
- B. The Officer erred in the analysis of the factor of hardship.

[10] I agree with the parties that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25 [*Vavilov*]).

[11] In conducting a reasonableness review, a Court must assess the reasonableness of the decision based on a consideration of the record before the decision maker and determine whether both the outcome and rationale of the decision bear the hallmarks of the exercise of public power, which requires that it be transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

[12] Under a reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov* at para 100).

IV. Analysis

A. *The Officer failed to properly consider the factor of family violence*

[13] The Officer considered the Applicant's circumstances of abuse under the heading, "Other factors for consideration," and stated this:

I accept the applicant was a victim of domestic violence and I sympathize with the applicant's situation. Furthermore, I accept her ex-spouse started a spousal sponsorship application in May 2020 and this application was converted from that spousal sponsorship. However, with that said, the applicant has proffered little evidence outlining what hardship she faces by leaving Canada, as a result of this separation.

[14] I find that the Officer erred in considering that domestic violence has no significance to an H&C assessment unless linked to hardship associated with the Applicant's return to South Africa. In confining this factor to such limited consideration, the Officer fettered their discretion and failed to heed the Court's direction to conduct a global assessment and consider the specific circumstances of the case (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 25, 27, 32–33 [*Kanthasamy*]). A decision that is the product of fettered discretion is unreasonable (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24).

[15] The Officer should have given the factor of domestic violence greater consideration in two ways.

[16] First, the Officer should have considered how the Applicant's circumstances impacted the strength of other aspects of the Applicant's case. Notably, the Officer gave little weight to the Applicant's level of establishment, finding that her ties to Canada were no greater than those she had to South Africa. However, the Officer failed to consider whether the Applicant's circumstances as a victim of domestic abuse reasonably explained her level of establishment. This is in keeping with a global assessment of the Applicant's circumstances and a genuine consideration as to whether they excite the community's desire to relieve her of her misfortunes (*Kanthasamy* at para 21).

[17] An assessment of the Applicant's level of establishment that takes into account her circumstances of family violence might consider that it is actually quite extraordinary that the Applicant managed to obtain a Master's degree and remain gainfully employed in Canada despite the abuse she endured, during which time she also suffered a miscarriage.

[18] Secondly, the Officer erred in failing to give full consideration to the Applicant's loss of ability to obtain permanent resident status through a spousal application sponsored by her Husband and whether this amounted to disproportionate hardship (*Jogia v Canada (Citizenship and Immigration)*, 2009 FC 596 at paras 45, 50 [*Jogia*]). As Justice O'Keefe recognized in *Jogia*:

The consequence of ignoring the domestic violence experienced by the applicant is that the decision fails to acknowledge the role the immigration process had in the violence, albeit unintentionally, when the applicant remained in her marriage for fear of being deported. And while, the officer is not compelled to follow the Gender Guidelines or the CIC Manual, these policies suggest that the evidence on domestic violence including the psychological report is more important and bears mentioning. There is a big

picture in this analysis which includes public policy considerations found in the wording of the preamble, the objectives and section 25 of the *Act*. These considerations point strongly towards an error by the officer in failing to discuss in his decision the impact of domestic violence on the applicant related to her immigration status (*Jogia* at para 45).

[19] The Respondent's counsel submits that *Jogia* is distinguishable, since the officer in that case gave no weight to the applicant's circumstances of family violence, whereas the Officer gave the consideration "some weight" in this case. The Respondent submits that any re-examination of this factor would exceed the Court's role on judicial review (*Vavilov* at para 125).

[20] I find that Justice O'Keefe's concern in *Jogia* is well-founded in this case and that the Officer's mere mention of the fact of conversion of the Applicant's spousal sponsorship without acknowledging the role that the sponsorship played in the abusive relationship casts doubt on the reasonableness of the Officer's consideration of hardship in this case.

[21] The importance of a more sensitive and transparent analysis cannot be overemphasized; the failure to engage in a more robust analysis in such circumstances leaves victims of domestic abuse with the daunting and unacceptable message that they are better off remaining in their abusive relationship in order to obtain status.

B. *The Officer erred in the analysis of the factor of hardship*

[22] The Applicant argues that the Decision does not reflect a compassionate consideration of whether her circumstances demonstrate "unusual or undeserved" or "disproportionate" hardship in connection with her ability to pay for her medication if she is forced to return to South Africa.

[23] The Officer stated:

I have read the letter presented by the applicant with respect to her HIV+ status and that she is concerned she will not be able to afford the medication she needs. While I acknowledge the applicant is HIV+ and takes Atripla medication, little evidence was presented demonstrating how she paid for her medication while living in South Africa. I note that from a previous medical assessment the applicant has been HIV+ since 2013 and has been taking Atripla. I find the applicant has not presented submissions demonstrating that she was unable to afford her medication while living in South Africa, or why she would be unable to afford her medication upon her return. The onus is on the applicant to provide all evidence to support any statement made in the application.

[24] The Respondent submits that the Decision is reasonable as the Applicant simply failed to provide sufficient evidence of an inability to pay. At the same time, the Respondent acknowledges that the Officer found that, not only had the Applicant sold all her assets in South Africa before she came to Canada, but that she will face an indeterminate period of unemployment. While the Officer suggested these circumstances would be mitigated by family support, counsel for the Respondent was unable to point to any evidence in the record that supports this important mitigating factor upon which the Officer's decision is based. The Officer's Decision is not justified on the record (*Vavilov* at para 105).

V. Conclusion

[25] The Officer's failure to give proper consideration to the Applicant's circumstances as a survivor of family violence and the hardship she will face in South Africa renders the Decision unreasonable. Accordingly, this application is granted.

JUDGMENT in IMM-10172-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The matter is returned for redetermination by a different decision maker; and
3. There is no question for certification.

"Allyson Whyte Nowak"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10172-23

STYLE OF CAUSE: GRACE MABENA v MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 9, 2025

JUDGMENT AND REASONS: WHYTE NOWAK J.

DATED: APRIL 15, 2025

APPEARANCES:

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