Federal Court  Cour fédérale

Date: 20250529

Docket: IMM-8158-24

Citation: 2025 FC 967

Toronto, Ontario, May 29, 2025

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

CATALINA NICOLASA ERROA DE ELIAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Ms. Catalina Nicolasa Erroa de Elias seeks judicial review of a decision by a Senior Immigration Officer, in which her application for permanent residence from within Canada on humanitarian and compassionate grounds was rejected.

[2] For the reasons that follow, I will grant this application for judicial review.

II. BACKGROUND

A. *Facts*

[3] Ms. Erroa de Elias, ("the Applicant") is 67 years old and is a citizen of El Salvador. She arrived in Canada in 2002 to visit and care for her mother, after the breakdown of her marriage. She stayed with her brother's family, and provided care to their mother, and to his child. She continues to act as her mother's primary caregiver, as her mother suffers from diabetes. Ms. Elias' daughter also immigrated to Canada on a spousal sponsorship and hoped to sponsor her mother, but her husband has not permitted this. The Applicant has not held a valid immigration status since 2003.

[4] Since being in Canada, Ms. Erroa de Elias has established herself by providing assistance to her brother's family, her mother, and her daughter; learning English; volunteering at the Spanish Church and the Salvation Army; working as a caregiver to a child with special needs; and selling El Salvadorian food. She additionally provides financial support to her other daughter in El Salvador, as this daughter has medical conditions requiring surgery.

[5] In 2011, the Applicant's son was murdered by gang members in El Salvador.

[6] Ms. Erroa de Elias was diagnosed with thyroid cancer in 2019, and is now in remission, although she will take thyroid medication for the rest of her life.

[7] The Applicant made an application for permanent residence based on humanitarian and compassionate grounds [H&C] in February 2023, based on her establishment in Canada; her

family relationships in Canada, including her role as primary caregiver for her mother; and the hardship she would experience in El Salvador, particularly given her age and healthcare concerns.

B. *Decision under Review*

[8] An Officer with Immigration, Refugees and Citizenship Canada [IRCC] refused the Applicant's H&C application in 2024. While the Officer assigned some positive weight to Ms. Erroa de Elias' establishment, particularly her extensive volunteering and desire to support herself financially by working various jobs, and her friendships within her communities, the Officer also found that this establishment was not out of the ordinary for someone who has lived in Canada for twenty years. The Officer further noted that Ms. Erroa de Elias has not stayed in Canada for reasons beyond her control. Finally, on this point, the Officer assigned negative weight to the fact that Ms. Erroa de Elias had lived and worked in Canada without authorization for almost twenty years.

[9] On the issue of the Applicant's family ties, the Officer accepted that Ms. Erroa de Elias is the primary caregiver for her mother, who is quite elderly and has diabetes. However, the Officer found that there was insufficient evidence about her mother's needs and why they cannot be met "in the community she lives in." In particular, the Officer found that the needs of the Applicant's mother could be met by home support services available in Ontario, and "there is little evidence to show why the Applicant's presence is crucial for the well-being of her mother." The Officer also found insufficient evidence that Ms. Erroa de Elias supports, or has to support, a daughter with uterine cancer, given the lack of evidence of remittances sent home, and given that El

Salvador has a public health system. The Officer further found Ms. Erroa de Elias could maintain her family ties in Canada through communication technologies, as she has done with her daughter in El Salvador.

[10] The Officer gave some weight to the Applicant's daughter's inability to sponsor her as part of the family class. In contrast, the Officer gave little weight to Ms. Erroa de Elias' health concerns, as El Salvador has public healthcare as well as a private healthcare system.

[11] Finally, the Officer gave little weight to the country conditions, as Ms. Erroa de Elias had adduced little to no evidence that she had been subject to gang violence, and in any event, she would be capable of seeking redress from the Salvadoran authorities. The Officer also found that Ms. Erroa de Elias is resourceful and lived in El Salvador for 45 years, so there is little evidence that she will be unable to find work in El Salvador due to her age.

III. ISSUES

[12] The Applicant submits that the Officer's decision was unreasonable because: 1) it involved an unreasonable assessment of the Applicant's establishment in Canada; and 2) it failed to properly assess the adverse country conditions in El Salvador.

IV. STANDARD OF REVIEW

[13] The parties do not dispute that the appropriate standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16, 23,

25; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 44-45 [*Kanthasamy*].

V. LEGAL FRAMEWORK

[14] Subsection 25(1) of the *Immigration and Refugee Protection Act* [IRPA] governs applications based on humanitarian and compassionate grounds. The relevant aspects of the provision are as follows:

Humanitarian and compassionate considerations — Minister's own initiative	**Séjour pour motif d'ordre humanitaire à l'initiative du ministre**
25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35, 35.1 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.1 (1)** Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35, 35.1 ou 37 — ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[15] Operationalizing s.25 into a clear, consistent, and predictable legal framework has proven to be a challenging task. This is due in part to the broad and discretionary purpose underlying s.25. It is also because s.25 is invoked to provide relief in an almost infinite range of circumstances. Finally, it is due to the inherent subjectivity of terms such as "humanitarian" and

"compassionate": *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338 at pg. 350 [*Chirwa*]; aff'm in *Kanthasamy* at para 13.

[16] In *Kanthasamy,* the Supreme Court of Canada described s.25 of the IRPA as "a flexible and responsive exception to the ordinary operation of the Act…a discretion to mitigate the rigidity of the law in an appropriate case." The Court further stated that the H&C exception was not intended to be an alternative immigration scheme, but was rather meant to "offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy* at para 21, citing *Chirwa*.

[17] In arriving at this characterization of the H&C decision-making process, the majority of the Court differed substantively from the approach of the minority, which focused not so much on the meaning of the terms "humanitarian" and "compassionate," but on the exceptional nature of s.25. The dissent described the applicable analysis to be as follows: "in deciding whether to grant relief under s. 25(1), decision makers must determine whether, having regard to all of the circumstances, including the exceptional nature of H&C relief, decent, fair-minded Canadians would find it simply unacceptable to deny the relief sought": *Kanthasamy* at para 63.

[18] While it remains somewhat unclear whether the majority in *Kanthasamy* adopted the language of *Chirwa* as a formal test against which to assess H&C applications, it is abundantly clear that *Chirwa* set out "important governing principles" that should guide H&C assessments: *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 [*Marshall*] at para 30.

[19] Another clear takeaway from *Kanthasamy* is that immigration officers should avoid treating relevant considerations as independent thresholds for relief. The Court addressed this principle in discussing the various hardship factors that an individual may experience if required to leave Canada, but in my view, the sentiment applies to any relevant factor. The goal of an H&C assessment, in other words, is not to individually assess all relevant factors against an invisible threshold known only by the officer, but to weigh these factors holistically, for the larger purpose of determining the ultimate question - that being the *Chirwa* question. Slightly modifying the *Chirwa* language, the assessment is whether an individual's circumstances, when considered globally, and with humanity and compassion, would move a reasonable person to grant the relief that individual seeks: for similar language, see *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 24.

[20] While this language is clear enough, it remains difficult to apply consistently. One way that IRCC tries to assist immigration officers in exercising their discretion under s.25 is through the use of guidelines and instructions. The current version of the IRCC guideline on H&C decisions, which has been updated since the decision of the Supreme Court in *Kanthasamy*, makes it clear, in line with the above, that there is no hardship "test" for H&C applicants. The Guideline then provides a list of relevant, though not exhaustive, factors to consider:

- establishment in Canada for in-Canada applications;
- ties to Canada;
- the best interests of any children directly affected by the H&C decision;
- factors in their country of origin including adverse country conditions;
- health considerations including inability of a country to provide medical treatment;

- family violence considerations;
- consequences of the separation of relatives;
- inability to leave Canada has led to establishment (in the case of applicants in Canada);
- ability to establish in Canada for overseas applications;
- any unique or exceptional circumstances that might merit relief. (Canada, Immigration, Refugees and Citizenship Canada, *Humanitarian and compassionate assessment: Hardship and the H&C assessment* (Ottawa: IRCC, 2016) online: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-hardship-assessment.html).

[21] These are helpful factors, even if they are not exhaustive. Notable in its absence from the above is any language indicating that an individual's experience must be extraordinary, unusual, or disproportionate in relation to others. Once again, this is aligned with the majority's reasons in *Kanthasamy*, which in my view require officers to assess H&C applications in relation to the *Chirwa* principles, rather than in relation to others who may also seek H&C relief. This is a point that I will consider in further detail below, as it continues to be somewhat unsettled within the jurisprudence of this Court.

VI. ANALYSIS

[22] With the above in mind, I turn to the decision under review. The Applicant raises various arguments as to why, in her view, the Officer's decision was unreasonable. While I share some of the concerns articulated in those arguments, I will limit my analysis to the first, which is whether the Officer implicitly required that her application be extraordinary or exceptional.

According to the argument, such a requirement is inconsistent with the Supreme Court's adoption of *Chirwa* as the guiding principle for assessing H&C applications.

[23] As with numerous other recent decisions of this Court, I am persuaded that the Officer did not assess the Applicant's situation through a *Chirwa* lens. The Officer did not question the Applicant's credibility, and accepted various facts, including the following:

- The Applicant has lived in Canada for 20 years;
- Throughout this time, she has supported herself financially, primarily as a caregiver, which included care for a child with special needs, until the child's death in 2014;
- She has "extensive" volunteer experience in various organizations;
- In 2011, her son was murdered by gang members in El Salvador while working as a delivery man;
- She was diagnosed with thyroid cancer in 2019, and while she is now in remission, she will require thyroid medicine for life;
- The Applicant's daughter in Canada, who would otherwise be able to sponsor her for permanent residence, is unable to do so because her abusive spouse does not support it;
- She provides financial support for her other daughter who continues to reside in El Salvador and has complex medical problems of her own; and
- The Applicant lives with her brother, his family and her mother and she supports virtually all of her mother's care needs in Canada, which include bathing and feeding her, ensuring she takes her medication, and taking her to various medical appointments.

[24] Despite accepting these facts, the Officer immediately diminished them, stating as follows: "Simultaneously, I do not find her establishment to be out of the ordinary for someone

who has lived here for twenty years. It is not uncommon for individuals who reside in Canada to be employed, especially if the applicant intended on providing financial support to her family in El Salvador."

[25] As mentioned, this Court has now found on numerous occasions that the required assessment here was *not* whether the many factors listed above were ordinary, extraordinary, exceptional, or mundane; the assessment was whether those factors, when considered globally, and with humanity and compassion, would move a reasonable person to grant the Applicant's application: *Wray-Hunt v Canada (Citizenship and Immigration)*, 2023 FC 1687; *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482, at paras 20-24 and 28; *Solis Olvera v Canada (Citizenship and Immigration)*, 2023 FC 1760 at para 24; *Farhat v Canada (Citizenship and Immigration)*, 2023 FC 1427 at paras 27-33; *Fearon Edwards v Canada (Citizenship and Immigration)*, 2024 FC 1416 at paras 12-13; *Sukan v Canada (Citizenship and Immigration)*, 2023 FC 45 at para 26; *Buchberg v Canada (Citizenship and Immigration)*, 2024 FC 1581 at para 8; *Baptiste v Canada (Citizenship and Immigration)*, 2024 FC 181 at para 10; *Ganeshalingam v Canada (Citizenship and Immigration)*, 2024 FC 1437 at para 54; *Henry-Okoisama v Canada (Citizenship and Immigration)*, 2024 FC 1160 at paras 44-45.

[26] This Court has also found that the specific words used by an officer are not necessarily the linchpin for assessing reasonableness; what is more important, is that officers demonstrate an understanding and application of the *Chirwa* principles in their reasons. I agree with this sentiment, which appropriately places substance over form in the review of administrative decisions. That said, in this case I see little by way of form *or* substance to demonstrate that the Officer actively considered Ms. Erroa de Elias' application with the *Chirwa* principles in mind.

There is certainly no explicit mention of the principle in the Officer's decision; rather, there is a lengthy listing of various factors, together with an assignment of weight to each. Notably absent, however, is any indication of the larger purpose of the weighing process, which is the *Chirwa* purpose.

[27] Absent this grounding in the very purpose underlying H&C assessments, the Officer's decision lacks justification and intelligibility, and instead appears arbitrary. There is no sense as to *why* the many positive factors listed above were insufficient to attract H&C relief. Instead, there are relatively inscrutable findings such as the following:

> In all, I have considered the positive and negative aspects of the Applicant's establishment in Canada and for the reasons stated above I give it some weight.

[28] With this said, I have sympathy for the challenges faced by officers who consider H&C applications, in part because of the lack of a precise jurisprudential framework to guide the decision-making process. There is a reason for this lacuna, which is the broadly discretionary nature of the H&C process, and the Court's reticence to improperly fetter the Minister's discretion in this area. Thus, much is left to soft law instruments such as the Guideline mentioned above. This being the case, it is quite surprising that IRCC's Guideline similarly makes no mention, acknowledgement, or indication that the *Chirwa* principle even exists, despite the central role that it played in the Supreme Court's decision in *Kanthasamy*. To this extent, I can understand the Officer's failure to assess the Applicant's H&C application with a *Chirwa* lens in mind. This does not, however, render the decision either intelligible or justified. And, to the extent that the Officer did rely on an understanding that the Applicant's case had to be extraordinary or exceptional, I find the decision lacking in these essential qualities.

[29] In setting out the above, I remain mindful of the fact that there is inevitably some hardship associated with being required to leave Canada, and that H&C applications are not, and were never intended to be, an alternative immigration scheme: *Kanthasamy* at para 23.

[30] This aspect of the *Kanthasamy* decision has led several judges of this Court to suggest that the process of H&C consideration *is* essentially a relational one, in which officers are to assess applications comparatively, searching for those amongst them that are exceptional, extraordinary, or unusual: *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 17-22; *Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 at paras 12-16, *Santiago v Canada (Citizenship and Immigration)*, 2020 FC 198 at para 105, and *Lee v Canada (Citizenship and Immigration)*, 2020 FC 504 at para 87.

[31] Respectfully, I side with the alternative position taken in those decisions cited at paragraph 25 of these reasons, all of which suggest that H&C applications are to be assessed on their own terms, with the *Chirwa* principle in mind - namely, whether the Applicant's circumstances, irrespective of the circumstances of other H&C applicants, warrant relief on humanitarian and compassionate grounds.

[32] I arrive at this conclusion based first on the text of s.25, which clearly carves out H&C relief as an exemption, but makes no mention that such relief is limited to extraordinary circumstances in relation to others. I also rely on the majority's reasoning in *Kanthasamy* which, unlike the dissenting reasons, conspicuously avoids any language indicating that H&C relief is limited to unusual or unique circumstances, in relation to others who may be seeking similar relief: see paragraphs 19-21, above.

[33] I would add here that I agree entirely with my colleague Justice McHaffie, who observed that the use of words such as “extraordinary” or “exceptional” will not always indicate an error, provided that their use is limited to the descriptive sense of the terms in this context. In other words, it is not an error to generally refer to H&C relief as being exceptional, because it is invoked as an exception to the ordinary operation of the IRPA. However, to the extent that these terms may be used, explicitly or implicitly, to “import a legal standard into the H&C analysis that is different than the *Chirwa*/*Kanthasamy* standard,” such usage is contrary to the reasons of the *Kanthasamy* majority: *Damian v Canada (Citizenship and Immigration)* 2019 FC 1158 at paras. 19-21 [Damian]. I also agree with Justice McHaffie that, given “the potential for words such as “exceptional” and “extraordinary” to be taken beyond the merely descriptive to invoke a more stringent legal standard, it may be more helpful to simply focus on the *Kanthasamy* approach, rather than adding further descriptors”: *Damian* at para 21.

[34] In this case, I find the Officer’s statement that the Applicant’s establishment was simply ordinary clearly, if implicitly, suggests that the Officer had in mind a standard requiring extraordinary establishment. This is precisely the distortion of the *Kanthasamy* approach that was warned against in *Damian* and the other cases listed at para 25, above.

[35] With that said, even if I were to accept that H&C relief is limited to some standard of extraordinary circumstances, it is completely unclear to me how the Officer in this case concluded that the Applicant did not meet this rather opaque threshold. Here, there were numerous factors, all of which weighed heavily in favour of H&C relief, with minimal negative factors, aside from the Applicant’s lack of status in Canada. In these circumstances, even accepting a view of H&C relief as being inherently limited to extraordinary circumstances

(which I do not accept), I find that the Officer's reasons lacked both an evidentiary foundation and adequate justification.

VII. CONCLUSION

[36] For the above reasons, I will grant this application for judicial review. The parties did not propose a question for certification, and I agree that none arises.

JUDGMENT in IMM-8158-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted to a different decision-maker for reconsideration in accordance with these reasons.

3. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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