Federal Court  Cour fédérale

Date: 20200127

Docket: IMM-1568-19

Citation: 2020 FC 133

Ottawa, Ontario, January 27, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

HARJIT KAUR SIDHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench in Toronto, Ontario on January 23, 2020, subject to revision for grammar, syntax, case citations and quotations, and language)

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of a decision of a senior immigration officer [Officer] who denied the Applicant's application for permanent residence on humanitarian and compassionate grounds [H&C].

[2] The Applicant is a 54-year-old citizen of India. She has a multiple entry visa valid to 2020 and has been to Canada to visit and stay with family since 2011; on occasion she had been denied visitors visas. She most recently entered Canada in December, 2016.

[3] The Applicant submitted an application for permanent residency in Canada on H&C grounds in April 2017. Her application was based upon establishment, the best interest of her grand-daughter, family ties, lack of social, emotional and financial support in India and the hardship she would face if she was forced to return to India as an aging woman.

[4] The Applicant is widowed and most if not all her immediate family lives in Canada. This family includes her only child - her son, her daughter-in-law, her grand-daughter, each of her five siblings and their children together with their elderly parents.

[5] On an application such as this, the standard of review is reasonableness.

[6] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which was issued along with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner [*Vavilov*], Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons

> provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov*, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on … are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100). In this case, that burden lies with the Union.
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> [Emphasis added]

[7] In my respectful view, the following findings by the Officer are speculative, and are not based on the record. As such, they are not “justified in relation to the facts … that constrain the decision maker” in this case.

[8] First, the Officer held that: “the Applicant can obtain permanent resident status through normal means from overseas”. In fact, the record indicates this cannot be done as simply as that, because it is up to a lottery and chance. Therefore this statement is, in my view, not supported by the record.

[9] Secondly, the Officer said that "she can return for long term visits whenever she choses to," whereas in fact the evidence before the Officer was that she had been refused visitors visas in the past. This finding is not supported by the record.

[10] Third, the Officer said he 'believed' that the Applicant had developed, and continued to have, family, friends, acquaintances and social networks in India. In fact, the evidence before the Officer was that the Applicant was alone in India.

[11] Fourth, the Officer indicated as a fact that the Applicant lived with her deceased husband's family in India. He does not directly say that that is where she lived at the time of the application. However that is the inference that one might draw from the comment, otherwise there is no explanation as to why the Officer would make this comment. This indication by the Officer, if it is a fact at all, appears to come from a TRV application, which the parties agreed was made in 2012. Thus, if the statement is accurate, it reflects very dated information that may be stale. However, and in any event, the TRV application purportedly relied upon by the Officer is not part of the Certified Tribunal Record. On judicial review I may not accept findings made by an officer that are not grounded in the record under review. I find this assertion was not grounded in the record.

[12] I am also concerned that the Officer fettered his discretion in stating a proposition of law that is not accurate. In particular, the third paragraph of the Officer's reasons states in part:

> There is insufficient evidence before me that she would be unable to apply in a normal manner. While it may be convenient for the Applicant to remain in Canada and apply for permanent residence, the purpose of humanitarian and compassionate applications is not

> convenience, but rather to allow relief and deserving cases where relief is not available through normal legislative means.
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> [Emphasis added]

[13] In my view this puts the test too high, but in any event, even if the statement is valid, through the principles of comity I am bound to accept the decision recently made by my colleague, Justice Favel in *Wardlaw v Canada (Citizenship and Immigration)*, 2019 FC 262, at paragraph 36 where Justice Favel stated:

> [36] At several points in the decision, the Officer notes that the Principal Applicant has failed to prove that she is not eligible for the SCLPC. Nowhere in the text or purpose of subsection 25(1) does such an obligation arise. Instead, the Officer has placed a burden on the Applicants based on the policy contained in the IRCC Manual. The Officer has fettered her discretion by treating the manual as if it were a binding legal framework.

[14] Finally and more generally, as I did in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72, I see almost no trace of the analysis set out in *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338, which analysis is required in addition to the hardship analysis, by the Supreme Court of Canada's decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. In this respect, I refer to paragraph 13 of *Kanthasamy* where, per by Justice Abella, the majority stated:

> [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes warrant the granting of special relief from the effect of the provisions of the Immigration Act": p. 350.

> This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.
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> [Emphasis added]

[15] Looking at the Decision holistically and appreciating that judicial review is not a treasure hunt for error, I have concluded the Decision is not justified in relation to the facts and law that constrain the decision-maker, as required by *Vavilov* at paragraph 85 as referenced by Justice Rowe in *Canada Post* at paragraph 31.

[16] Neither of the parties submitted a certified question for consideration, and none is therefore stated.

JUDGMENT in IMM-1568-19

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted;
2. The decision of the Officer is set aside and the matter is to be remitted for re-determination by a different decision maker;
3. No question is certified; and
4. There is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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