Federal Court  Cour fédérale

Date: 20211209

Docket: IMM-683-20

Citation: 2021 FC 1377

Ottawa, Ontario, December 9, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

KEABETSWE DUDU RANNATSHE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] When a single immigration officer reviews both a Pre-Removal Risk Assessment (PRRA) application and an application for relief on humanitarian and compassionate (H&C) grounds, they must consider the evidence put forward in both applications. The Senior Immigration Officer who refused Keabetswe Dudu Rannatshe's H&C application on December 5, 2019 failed to consider the evidence in the PRRA application that was also before

them, limiting their assessment to the "applicant's H&C materials." They also erroneously dismissed Ms. Rannatshe's concerns about the hardship she would face in Botswana on the basis that her refugee claim and PRRA application had previously considered those risks and that she would not be more likely than others in Botswana to face gender-based violence.

[2] In my view, these material flaws in the Officer's reasoning render their refusal of the H&C application unreasonable.

[3] Ms. Rannatshe's application for judicial review is therefore granted and her H&C application is remitted to a different officer for consideration.

II. Issues and Standard of Review

[4] As the parties agree, the Court reviews the merits of an H&C decision on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. The central issue before the Court on this application for judicial review is therefore whether the refusal of Ms. Rannatshe's H&C application was unreasonable.

[5] In challenging the reasonableness of the decision, Ms. Rannatshe raises four main questions:

1) Did the Officer err in their approach to the H&C application by failing to consider Ms. Rannatshe's circumstances with compassion and empathy?

2) Did the Officer err in their assessment of the hardship facing Ms. Rannatshe upon return to Botswana?

3) Did the Officer err in considering the best interests of the child (BIOC), namely Ms. Rannatshe's son in Botswana?

4) Did the Officer err in their assessment of Ms. Rannatshe's establishment in Canada?

[6] In assessing these questions on the reasonableness standard, the Court begins by examining the reasons given with 'respectful attention' and seeking to understand the decision maker's reasoning process: *Vavilov* at para 84. The Court is to assess whether the decision as a whole, read in light of the record, is transparent, intelligible, and justified in light of the legal and factual constraints on the decision, and should not seize on a "minor misstep" or peripheral flaw: *Vavilov* at paras 15, 85, 99–103. Rather, the Court will only set aside a decision as unreasonable if it concludes there are "sufficiently serious shortcomings" in the decision that it does not exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov* at paras 99–100.

[7] For the reasons that follow, I conclude the second question raised by Ms. Rannatshe above is determinative. The Officer's reasons in respect of the hardship facing Ms. Rannatshe in Botswana did not conform with the relevant legal constraints. This was a sufficiently serious shortcoming that it renders the decision as a whole unreasonable.

III. Analysis

A. *Ms. Rannatshe's PRRA and H&C applications*

[8] Ms. Rannatshe arrived in Canada in 2012 and sought refugee protection owing to her fear of W, an abusive and violent former partner in Botswana. Ms. Rannatshe entered a relationship with another man with whom she had a child in 2011. W threatened her when he first learned of her pregnancy, and threatened to kill her and her partner in April 2012 following the birth of her child. Ms. Rannatshe reported this incident to the police, but when they only held W in custody for a week, she fled to Canada.

[9] Ms. Rannatshe's refugee claim was denied by the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada in September 2013. The RPD did not question Ms. Rannatshe's credibility, but concluded she had established no more than a mere possibility of persecution from W.

[10] Ms. Rannatshe subsequently met and married a Canadian in 2014, who applied to sponsor her for permanent residency. However, he withdrew that application in 2016 and the couple divorced in 2018 amid further abuse by Ms. Rannatshe's Canadian husband.

[11] Ms. Rannatshe submitted an H&C application in January 2019 and a PRRA application a month later. The PRRA application highlighted her risk from W, noting he had recently moved from Gabarone to her village, and her risks of facing gender-based violence in Botswana. The

H&C application highlighted the best interests of Ms. Rannatshe's son in Botswana, her establishment in Canada, and the hardship to her if she were required to return to Botswana.

B. *Refusal of the PRRA and H&C applications*

[12] The same Senior Immigration Officer decided Ms. Rannatshe's PRRA and H&C applications, on December 3 and 5, 2019, respectively. With respect to the PRRA application, the Officer found Ms. Rannatshe's concerns about W's move to her village did not demonstrate a forward-looking risk of harm. They also concluded that the articles Ms. Rannatshe submitted showed police in Botswana had implemented initiatives to address gender-based violence issues, and that Ms. Rannatshe did not demonstrate she would be unable to access state protection. The Officer further found the materials filed did not demonstrate that Ms. Rannatshe would not have an internal flight alternative available in Botswana.

[13] This Court granted Ms. Rannatshe leave to seek judicial review of the refusal of the PRRA application in April 2021 (Court File No IMM-684-20). However, Ms. Rannatshe was removed from Canada to Botswana in February 2020 after her request for a stay of that removal was dismissed: *Rannatshe v Canada (Public Safety and Emergency Preparedness)*, IMM-1250-20, February 25, 2020. The application for judicial review of the refusal of the PRRA application was discontinued shortly before the hearing of this matter.

[14] The Officer's reasons for refusing Ms. Rannatshe's H&C application addressed her establishment in Canada, the domestic abuse she had suffered here, her risk of harm in Botswana, adverse country conditions in Botswana with respect to gender-based violence and

employment, and the best interests of Ms. Rannatshe's son and two other identified children. With respect to establishment, the Officer noted that Ms. Rannatshe had been in Canada for 7½ years, a "significant period of time." However, the Officer concluded Ms. Rannatshe had not demonstrated "an exceptional degree of establishment in Canada" and that her level of establishment in Canada was not "greater than what individuals who are similarly situated to the applicant would acquire over the course of living and working in Canada for several years."

[15] On the issue of risk of harm in Botswana from W, the Officer's analysis was the following:

> The applicant's H&C materials indicate that the applicant would be at risk of harm in Botswana from her former partner, [W]. However, I note that the applicant has not submitted any documentary evidence on this H&C application to support this statement. In the absence of supporting documentary evidence I do not find that the applicant's H&C materials demonstrate that the applicant would be at risk of harm in Botswana from her former partner, [W].
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> As well, I note that the applicant's statement that she would be at risk of harm in Botswana from her former partner, [W] was considered by both the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), and by myself as the decision maker on the applicant's Pre-Removal Risk Assessment (PRRA). I note that both the applicant's claim for refugee protection, and the applicant's PRRA were refused.
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> [Emphasis added.]

[16] On the issues of gender-based violence and poor economic conditions in Botswana, the Officer similarly referred on several occasions to "the applicant's H&C materials," noting she had not submitted documentary evidence in those materials to support statements about gender-based violence, and that those materials did not show her to be at risk of harm from W. The

Officer did note that Ms. Rannatshe had submitted articles in support of her PRRA that indicated that gender-based violence was a serious ongoing issue in Botswana. However, they found the articles did not "indicate that the applicant would be more likely than other individuals to experience GBV in Botswana."

C. *The Officer's refusal of the H&C application was unreasonable*

[17] In my view, the Officer's analysis of the risks and hardship facing Ms. Rannatshe in Botswana was unreasonable in three respects.

[18] First, this Court has held that where an applicant submits H&C and PRRA applications that are reviewed by the same officer in close succession, the officer's decision on each is to be based on the "totality of the evidence" in both the H&C application and the PRRA application: *Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300 at para 12; *Durrant v Canada (Citizenship and Immigration)*, 2010 FC 329 at paras 21, 32–33; *Giron v Canada (Citizenship and Immigration)*, 2013 FC 114 at paras 14–15; *Denis v Canada (Citizenship and Immigration)*, 2015 FC 65 at paras 38–47; see also, after the Officer's decision, *Abdinur v Canada (Citizenship and Immigration)*, 2020 FC 880 at para 13.

[19] Here, given their repeated reference to "the applicant's H&C materials," it is clear the Officer sought to compartmentalize the two applications, ignoring evidence filed in the PRRA application in their assessment of the H&C application. In particular, on the material issue of potential harm from W, the Officer based their conclusion primarily on the absence of "documentary evidence on this H&C application." This approach failed to follow relevant legal

constraints on the decision and was unreasonable. While the Officer did refer to articles filed on the PRRA application on the issue of gender-based violence in Botswana, this does not in my view affect the unreasonableness of failing to consider such evidence in respect of the risk from W.

[20] The Minister points out that an H&C applicant has the onus to establish the facts on which their application rests, and omits evidence and submissions "at their peril": *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8. The Minister also argues there was no guarantee Ms. Rannatshe's H&C and PRRA applications would be reviewed by the same officer, and that an applicant should not assume that the same officer will review both applications. I agree that an applicant who fails to include all relevant evidence in one of their applications faces a risk if the applications are decided by different officers. However, this does not change the principles applicable when a single officer decides the two applications: *Denis* at paras 41–42. As Justice Mandamin noted in *Durrant*, review by a single officer ideally leads to better decisions: *Durrant* at para 21. The officer may be able to consider inconsistencies between the evidence put forward in the two applications. The corollary is that an officer cannot ignore evidence material to one of the applications that is presented in the other.

[21] Second, it was unreasonable for the Officer to dismiss concerns about the risks from W on the basis that Ms. Rannatshe's refugee claim and PRRA application, each of which raised the risk from W, were both refused. Even prior to the Supreme Court of Canada's decision in *Kanthasamy*, this Court made clear that an officer should not "close their mind" to risk factors in an H&C application simply because they did not meet the standard applicable on a

PRRA application: *Pinter v Canada (Minister of Citizenship and Immigration)*, 2005 FC 296 at para 5; *Gaya v Canada (Citizenship and Immigration)*, 2007 FC 989 at paras 24–26; *Durrant* at paras 21–24. In *Kanthasamy*, the majority of the Supreme Court underscored that failure to meet the standards for refugee protection does not preclude consideration of the same underlying facts on an H&C application:

> And, as is stated in s. 25(1.3) […] s. 25(1) is not meant to duplicate refugee proceedings under s. 96 or s. 97(1), which assess whether the applicant has established a well-founded fear of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment.
>
> What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them[.]
>
> […]
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> As the Federal Court of Appeal concluded in this case, s. 25(1.3) does not prevent the admission into evidence of facts adduced in proceedings under ss. 96 and 97. The role of the officer making a determination under s. 25(1) is to ask whether this evidence, along with any other evidence an applicant wishes to raise, though insufficient to support a s. 96 or s. 97 claim, nonetheless suggests that "humanitarian and compassionate considerations" warrant an exemption from the normal application of the *Immigration and Refugee Protection Act*. In other words, the officer does not determine whether a well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment has been established — those determinations are made under ss. 96 and 97 — but he or she can take the underlying facts into account in determining whether the applicant's circumstances warrant humanitarian and compassionate relief.
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> [Underline added; italics in original; citations omitted; *Kanthasamy* at paras 24–26, 51]

[22] The Officer's reliance on the refusal of Ms. Rannatshe's claim for refugee protection and her PRRA application as a basis not to consider the risks of harm from W in Botswana was contrary to this authority and was unreasonable.

[23] Third, it was unreasonable for the Officer to dismiss Ms. Rannatshe's concerns about gender-based violence in Botswana on the basis that she would not be "more likely than other individuals to experience GBV in Botswana." There is no requirement that an applicant for H&C relief show they are more at risk of a particular hardship than others. As Justice Mosley clearly put it in *Gonzalez*, "an H&C applicant may raise hardship that is also faced by others in the country of removal. She need not prove that the hardship she will face differs from that faced by anyone else": *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382 at para 55. As with the prior error, it appears that the Officer was viewing the H&C application through the lens of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and not with an eye to assessing whether Ms. Rannatshe's situation merited H&C relief in all of the circumstances of her case.

[24] In my view, these significant errors on the part of the Officer rendered their analysis of hardship and risk in Botswana unreasonable. As hardship was a central aspect of Ms. Rannatshe's H&C application, the Officer's errors cannot be viewed as superficial or peripheral to the merits. Rather, they showed significant shortcomings on a central aspect of the decision, rendering the decision as a whole unreasonable: *Vavilov* at para 100.

[25] Given my conclusions on this issue, I need not address Ms. Rannatshe's other arguments. Nonetheless, I do consider it worth briefly noting my concern with the Officer's treatment of establishment. In particular, I consider it unsound to disregard Ms. Rannatshe's establishment in Canada as a positive factor because she did not have an "exceptional" degree of establishment. On my understanding of *Kanthasamy*, an officer reviewing an H&C application is to consider an applicant's circumstances and give weight appropriately, and not to impose "adjectives as discrete and high thresholds" in a way that limits their discretion: *Kanthasamy* at para 33; see discussion in *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 17–21. Nor does it appear sound to disregard Ms. Rannatshe's establishment because it was not "greater than" what similarly situated individuals would acquire in the same period. In addition to the difficulty in attempting to define a standard or expected degree of establishment over a particular period, this approach risks ignoring even lengthy and integrated establishment in Canada on the basis that others would also have that level of establishment. However, I do not need to address these concerns further in light of my determination that the Officer's hardship analysis rendered their decision unreasonable.

IV. Conclusion

[26] For the reasons given, the application for judicial review is granted and Ms. Rannatshe's application for H&C relief is remitted to a different officer. I note that in the circumstances, since the H&C application will not be determined along with the PRRA application by the same officer in close succession because the PRRA application is not being remitted, Ms. Rannatshe should be given an opportunity to ensure that her H&C application contains all of the relevant evidence she wishes it to include.

[27] Neither party proposed a question for certification. I agree that none arises.

JUDGMENT IN IMM-683-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. Keabetswe Dudu Rannatshe's application for relief on humanitarian and compassionate grounds is remitted for redetermination by another officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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