Federal Court  Cour fédérale

Date: 20220412

Dockets: IMM-3908-20
IMM-3912-20

Citation: 2022 FC 525

Ottawa, Ontario, April 12, 2022

PRESENT: Mr. Justice Norris

Docket: IMM-3908-20

BETWEEN:

RUBAB FATIMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-3912-20

AND BETWEEN:

MUHAMMAD ANJUM BOKHARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicants are siblings. In September 2018, they both submitted applications for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The applications were refused by a Senior Immigration Officer on August 25, 2020. Although separate decisions were rendered, the Officer noted that the applications were connected and the two decisions were based on the information provided in both applications.

[3] The applicants now apply for judicial review of the decisions under subsection 72(1) of the *IRPA*. Given the links between the two applications, they were heard together and will be dealt with in a single set of reasons.

[4] For the reasons that follow, the applications for judicial review must be allowed.

II. BACKGROUND

[5] Both applicants were born in Sialkot, Pakistan. They arrived together in Canada in September 2015 and made claims for refugee protection. At the time, Mr. Bokhari was almost 28 years of age and Ms. Fatima was 24.

[6] The refugee claims were based on their fear of persecution as Shi'a Muslims and as former members of the Imamia Student Organization. The claims were ultimately rejected by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada on the basis that the applicants had an internal flight alternative ("IFA") in Islamabad, Pakistan. This decision was upheld on judicial review: see *Bokhari v Canada (Citizenship and Immigration)*, 2016 FC 1306. The applicants then sought a pre-removal risk assessment ("PRRA") under subsection 112(1) of the *IRPA* but this was refused in July 2018.

[7] In September 2018, the applicants applied for permanent residence in Canada under subsection 25(1) of the *IRPA.* Their applications were based on the hardship they would experience in Pakistan because of the harassment and discrimination they would suffer as members of the Shi'a minority and, in the case of Ms. Fatima, as a single woman; on their establishment in Canada; on Ms. Fatima's need for medical treatment for lupus nephritis and the resulting damage to her kidneys, which is not available in Pakistan; on the risks to her health of disrupting her ongoing treatment in Canada; and on Mr. Bokhari's role in providing the support Ms. Fatima requires because of her illness.

III. DECISION UNDER REVIEW

[8] The Officer was not satisfied that the H&C considerations relied on by the applicants warranted the granting of relief.

[9] The Officer found that the applicants had failed to establish that they would experience discrimination due to their religious beliefs because they had not rebutted the previous findings

by the RPD and by the PRRA officer that they had an IFA in Islamabad. The Officer considered that the ability to relocate to Islamabad was "a mitigating factor for the alleged risk presented by the applicants." As a result, the hardship they alleged in this respect was given little weight.

[10] The Officer accepted that Ms. Fatima suffers from lupus and decreased kidney function but found that she had not established that the treatment she requires would not be available in Pakistan or that disruption to her treatment in Canada would be a serious hardship for her. Further, the Officer found that Ms. Fatima was unlikely to suffer hardship due to unequal access to employment in Pakistan. Thus, these factors were given little weight. The Officer did accept, however, that Mr. Bokhari has been a support for Ms. Fatima through her illness.

[11] Finally, the Officer found that the applicants had achieved a significant degree of establishment in Canada. The Officer gave this some weight in their favour.

[12] On the basis of a "global assessment of all the factors" presented by the applicants, the Officer was not satisfied that the H&C considerations they relied on justified granting an exemption under subsection 25(1) of the *IRPA*. Accordingly, both applications were refused.

IV. STANDARD OF REVIEW

[13] It is well-established that the substance of an H&C decision should be reviewed on a reasonableness standard: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[14] 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). The onus is on the applicants to demonstrate that the Officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). The court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*ibid.*).

V. ANALYSIS

[15] The sole issue raised by the applicants is whether the Officer's decisions are unreasonable.

[16] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. As the provision states, relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." Whether relief is warranted in a given case depends on the specific circumstances of that case: see *Kanthasamy* at para 25. In the present case, the applicants seek an exemption on H&C grounds from the usual requirement that one must apply for permanent residency from outside Canada.

[17] When subsection 25(1) of the *IRPA* is invoked, the decision maker must determine whether an exception ought to be made to the usual operation of the law: see *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22. This discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases: see *Kanthasamy* at para 19. It should be exercised in light of the equitable underlying purpose of the provision: *Kanthasamy* at para 31. Thus, decision makers should understand that H&C considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] 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" (*Kanthasamy* at para 13, adopting the approach articulated in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338). Subsection 25(1) should therefore be interpreted by decision makers to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). At the same time, it is not intended to be an alternative immigration scheme: see *Kanthasamy* at para 23.

[18] It follows from the discretionary nature of decisions under subsection 25(1) of the *IRPA* that generally the administrative decision maker's determinations will be accorded a considerable degree of deference by a reviewing court: see *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; and *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15.

[19] It is not the role of a reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual determinations absent exceptional circumstances:

see *Vavilov* at para 125. Nevertheless, a reasonable decision is one that is justified by the facts; the decision maker "must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them" (*Vavilov* at para 126). Consequently, "[t]the reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*ibid.*).

[20] In my view, the Officer failed to account for the evidence in at least two material respects.

[21] First, on the one hand, the Officer recited evidence from Ms. Fatima's specialist that, as of 2019, her kidneys were functioning at 25%, her kidney function was continuing to decline despite different immunosuppressant treatments, and even with ideal therapy this decline may continue to the point of kidney failure, which would require life-long dialysis. Yet, on the other hand, the Officer gives Ms. Fatima's medical condition "little weight" because, while she was still living in Pakistan and her condition had not yet been diagnosed, she was nevertheless able to obtain higher education and work as a teacher. The Officer considered it significant that Ms. Fatima had "provided little information regarding how this pre-existing condition affected her ability to do this work and schooling in Pakistan." In short, the Officer appears to have reasoned that Ms. Fatima's condition cannot be all that bad given that she was able to cope with it well in Pakistan.

[22] The Officer's determination that Ms. Fatima's medical condition should be given "little weight" is unreasonable because it fails to account for the evidence cited in the decision itself that her health has deteriorated significantly since she came to Canada. That her condition was not as debilitating when she was living in Pakistan is largely irrelevant to its seriousness now given the evidence that it has become worse in the intervening years. It was unreasonable of the Officer to conclude otherwise.

[23] Second, Ms. Fatima's specialist, Dr. Boll, stated that she had been his patient since September 2015. The complexity of her case had required frequent clinic visits and even hospitalizations because of severe adverse reactions to immunosuppression therapy. As well, it was such that a referral for a further assessment by a leading expert in lupus nephritis was made. Dr. Boll also stated the following:

> Once again I would like to state my concern that deportation to Pakistan would be a significant health risk for Ms. Fatima. If she were able to access treatment and expert follow-up in a timely manner because of cost or lack of availability, she would be at great risk for a lupus nephritis flare in the short to intermediate term. This would put her at high risk for developing end-stage kidney disease requiring dialysis, especially if she continued to lack access to treatment and expert care.

[24] The Officer did not express any doubts about Dr. Boll's opinion. The Officer also accepted that, overall, Pakistan has a poor health care system. The Officer further found as follows regarding relocation from Canada to Islamabad: "I accept that there would be some challenge in relocating to a new city and finding new doctors, a pharmacy, and relevant health professionals without the help of other family members or friends. However, I do not find that

such a challenge justifies an H&C exemption, nor do I find that such a challenge makes relocation to Islamabad unreasonable."

[25] In my view, it was unreasonable for the Officer to dismiss the cessation of the treatment Ms. Fatima is receiving in Canada and the need to find a replacement in Islamabad as a mere "challenge" given the evidence before the Officer suggesting the serious implications this could have for Ms. Fatima's health. As Dr. Boll stated, requiring Ms. Fatima to leave Canada would be a "significant health risk" for her. There was no assurance that she would be able to obtain the care she requires in Islamabad (or anywhere in Pakistan, for that matter). Ms. Fatima bore the onus to provide evidence to support her request for an H&C exemption. The evidence she provided, which the Officer did not reject, was reasonably capable of supporting the argument that having to leave Canada and losing the care of her specialists would put her health at significant risk. To minimize this simply as a "challenge" Ms. Fatima would have to overcome suggests that her case was not considered with the empathy and compassion that is required.

[26] These are "sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). Ms. Fatima's health challenges was a central element in her request for H&C relief. These flaws in the Officer's assessment of that request are more than merely superficial or peripheral to the decision. On the contrary, they are sufficiently central that they call the reasonableness of the decision as a whole into question.

[27] These flaws have at most an indirect bearing on the decision refusing Mr. Bokhari's H&C application. Nevertheless, very fairly, counsel for the respondent acknowledged that, if the Court concluded that Ms. Fatima's H&C application had to be reconsidered, it would be appropriate to remit both matters for reconsideration given the close connections between the two. I agree.

[28] Since this is sufficient for the applications to be allowed, it is not necessary to address the other grounds on which the applicants contend that the decision is unreasonable.

VI. CONCLUSION

[29] For these reasons, the applications for judicial review are allowed, the decisions denying the applications for H&C relief dated August 25, 2020, are set aside, and the matters are remitted for redetermination by a different decision maker.

[30] Neither party proposed any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-3908-20 AND IMM-3912-20

THIS COURT'S JUDGMENT is that

1. The applications for judicial review are allowed.
2. The decisions of the Senior Immigration Officer dated August 25, 2020, are set aside and the matters are remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3908-20
STYLE OF CAUSE:	RUBAB FATIMA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	IMM-3912-20
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PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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