Federal Court  Cour fédérale

Date: 20220628

Docket: IMM-4193-21

Citation: 2022 FC 962

Toronto, Ontario, June 28, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

MANOMANI SELVAJOTHY KADIRAVELUPILLAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant applied for judicial review of a decision made by a senior immigration officer dated June 4, 2021, made under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). The applicant asked the Court to set aside the decision as unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[1] For the reasons below, the application will be allowed.

I. Facts and Events Leading to this Application

[2] The applicant is a citizen of Sri Lanka. She is 59 years old. Her life has been tragically altered by the deaths of her husband and both of her two sons. Her first son was killed in 1993, aged eight, while crossing a street in Sri Lanka. At the time, the applicant was out of the country working in Kuwait and her son was in the care of family members. They did not immediately tell the applicant what happened. Instead, they found a monk who came to tell her some two months after the incident.

[3] About two years later, the applicant's husband took his own life, as he was unable to cope with the loss of his son.

[4] The applicant's second son died of leukemia in 2003, after a year in hospital, at age 13. Hospital rules did not permit her to be present when he died.

[5] In 2009, the applicant left Sri Lanka to work in Cyprus as a live-in caregiver. Doing so helped her escape the daily memories of her losses.

[6] On July 4, 2015, the applicant came to Canada to become a live-in caregiver in Winnipeg. Her new employer had filed a Labour Market Impact Assessment ("LMIA") which had been approved in March 2014. She worked for this employer for a few months until the patient no longer wanted her care. After that, the applicant's first cousin, who also lived in Winnipeg, supported her financially.

[7] In October 2017, the applicant found new employment as a live-in caregiver. An LMIA was approved in June 2017 for a period of two years. She became the victim of financial abuse. Her employer did not pay her properly between November 2017 and July 2018. Her salary was paid irregularly and she would work overtime and weekends without extra pay. Eventually, she had to complain to the provincial government, which found she was owed approximately $36,500. She attempted to apply for status in Canada under provincially operated programs but was unable to pass the language test.

[8] In December 2020, the applicant applied for permanent residence with an exemption on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *IRPA*. The officer's negative decision is the subject of this application for judicial review.

[9] The officer considered the H&C application under the following headings: establishment in Canada; best interests of the children; medical considerations; and hardship upon return to Sri Lanka and adverse country conditions.

[10] In this Court, the applicant raised the following general issues to challenge the reasonableness of the decision:

- the officer erred in the assessment of the applicant's medical considerations; and
- the officer failed to meaningfully consider all of the evidence provided by the applicant.

[11] The applicant also raised issues of procedural fairness.

II. Analysis

A. *Legal Principles*

[12] The parties agreed that the standard of review of the officer's decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44.

[13] The reasonableness standard was described in *Vavilov*. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86.

[14] The reviewing court starts with the reasons of the decision maker, which are read holistically and contextually with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

[15] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. The H&C discretion in subsection 25(1) is a flexible and responsive exception to

the ordinary operation of the *IRPA*, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy*, at para 19.

[16] The discretion in subsection 25(1) must be exercised reasonably. Officers making H&C determinations must substantively consider and weigh all the relevant facts and factors before them: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 74-75; *Kanthasamy*, at paras 25 and 33.

B. ***Was the Officer's H&C Decision Unreasonable?***

[17] The outcome of this application turns on whether the officer's assessment of "medical considerations" was reasonable, including whether it respected the legal standards imposed by the Supreme Court's decision in *Kanthasamy* and the decisions of this Court concerning the assessment of mental health evidence in H&C applications.

[18] The officer accepted that the applicant has "suffered from an upsetting past, having lost her two children and husband in a very traumatic manner". After describing the losses of her immediate family, the officer found that the applicant was left widowed with no family and "till this day is still coping and grieving her losses".

[19] The officer found that the applicant had met with a therapist who assessed her as displaying various symptoms of Post-Traumatic Stress Disorder (PTSD). The officer noted that the therapist stated that removing her from Canada would "further trigger her symptoms as she would have to relive her memories". However, the officer found that the therapist indicated that

the symptoms did not interfere with her day-to-day activities and that letters of support indicated she was able to sustain a "normal lifestyle as well as perform her job effectively despite experiencing the symptoms". The officer noted that there was no indication that the applicant was currently receiving or would require ongoing treatment for her condition nor that such treatment would not be available in her country of origin. The officer found that although "there will inevitably be difficulties associated with a requirement to leave Canada, the fact that the applicant finds Canada to be a more desirable place to live then Sri Lanka is not determinative of an H&C application". The officer therefore placed "little weight on this factor".

[20] Later, the concluding section of the officer's reasons summarized the assessment of this issue:

> The applicant also endured a lot of emotional trauma while residing in her country of origin. She lost both her children and her husband and a short amount of time. As a result, she has shown signs of PTSD based on her assessment with [the therapist]. She is however able to carry on her daily activities which includes working, volunteering and attending church. Based on the evidence on file, the applicant is not receiving ongoing care for her PTSD. It is unclear how the applicant would be affected if she were to return to her country of origin considering she is not receiving consistent care here for this issue. As such, I place little weight on this factor.

[21] In *Kanthasamy*, the Supreme Court considered issues arising in an H&C application concerning a diagnosis of PTSD and whether an officer had properly considered the impact of removal to Sri Lanka. A majority of the Court concluded, at paragraphs 46-49, that the officer had improperly restricted her discretion when discussing the effect of removal back to Sri Lanka on Mr Kanthasamy's mental health. The Court found that the officer had discounted the diagnosis and the harm suffered by Mr Kanthasamy in Sri Lanka, in part by requiring additional

evidence about whether Mr Kanthasamy did or did not seek treatment in Canada, or what treatment was or was not available in Sri Lanka. The Court held that once the officer accepted the diagnosis, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, "undermined the diagnosis" and problematically made it a "conditional rather than a significant factor" in the H&C assessment.

[22] The Supreme Court in *Kanthasamy* also held that "the very fact that [Mr] Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition": *Kanthasamy*, at para 48. In this Court, see *Mitchell v. Canada (Citizenship and Immigration)*, 2022 FC 87, at para 9; *Montero v. Canada (Citizenship and Immigration)*, 2021 FC 776, at paras 27-29; *Rainholz v. Canada (Citizenship and Immigration)*, 2021 FC 121, at para 46; *Sanabria v. Canada (Citizenship and Immigration)*, 2020 FC 1076, at para 43; *Febrillet Lorenzo v. Canada (Citizenship and Immigration)*, 2019 FC 925, at para 22; *Esahak-Shammas v. Canada (Citizenship and Immigration)*, 2018 FC 461, at para 26; *Sitnikova v. Canada (Citizenship and Immigration)*, 2017 FC 1081, at paras 28-30; *Jang v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 996, at paras 31-32.

[23] In the present case, the officer accepted the facts giving rise to the principal basis for the applicant's claim for H&C relief (the loss of all of her immediate family in Sri Lanka) – which the officer twice characterized as "traumatic". The officer found that she was still coping and grieving her losses. In addition, the officer accepted the therapist's statement that she displayed

symptoms of PTSD and that removing her from Canada would "further trigger her symptoms as she would have to relive her memories" of the loss of her husband and sons.

[24] However, the officer stated that there was "no indication on file that the applicant is currently receiving or would require ongoing treatment in the future for this condition, nor that it wouldn't be readily available to her in her country of origin." Later in the reasons, the officer noted that she was not receiving ongoing care for her PTSD and concluded that it was "unclear how the applicant would be affected if she were to return to her country of origin considering she is not receiving consistent care here for this issue" [emphasis added].

[25] The officer's reasons thus used the absence of current treatment for PTSD both to diminish the existence of the applicant's PTSD symptoms and to reach a conclusion that it was unclear how the applicant would be affected if she were to return to Sri Lanka. Having accepted that the applicant was currently suffering from PTSD symptoms, it was an error for the officer to do so: *Kanthasamy*, at para 47; *Rainholz*, at para 68; *Sitnikova*, at para 30; *Apura*, at para 28; *A.B. v. Canada (Citizenship and Immigration)*, 2020 FC 498, at para 92.

[26] In addition, all of the evidence considered by the officer related to the applicant's circumstances in Canada, rather than what would happen if she returned to Sri Lanka. The officer considered the applicant's ability to engage in daily activities (such as working at the cleaning business, volunteering and attending church) and have a "normal lifestyle" – all of which concerned her life in Canada. The proper question to ask, however, concerned the impact on her PTSD symptoms if she returned to Sri Lanka – the location where she suffered the

traumatic events that led to her current symptoms. The officer's assessment of the applicant's medical conditions did not assess the evidence and failed to reach a conclusion on that critical issue.

[27] The officer's reasoning then minimized the applicant's PTSD symptoms by stating that she merely desired to stay in Canada. In my view, that comment was a *non sequitur* and had no relevance to the assessment of the impact of her removal to Sri Lanka on her mental health.

[28] Finally, the officer's summary subsequently stated the effect of removal was unclear, but as already noted, that reasoning was flawed as contrary to *Kanthasamy*.

[29] The respondent submitted that there was no evidence in the therapist's letter detailing the impact of a return to Sri Lanka on the applicant. In *Jesuthasan*, the assessment was that Ms Jesuthasan's removal to Sri Lanka "may further negatively impact her psychological well-being." The Chief Justice held that the officer failed to identify and weigh the fact that the applicant's mental health "might worsen" if she were to be removed to Sri Lanka: *Jesuthasan v. Canada (Citizenship and Immigration)*, 2018 FC 142, at paras 44-45. In addition, this Court has held that an officer may make reasoned inferences from the evidence from a report that signals mental health issues, including PTSD, and that if the impact upon return is not specifically analyzed, an officer may draw his or her own reasonable conclusions based on the totality of the evidence: *Apura v. Canada (Citizenship and Immigration)*, 2018 FC 762, at para 29. In that case, Justice Ahmed concluded that the officer's failure to do so was unreasonable.

[30] Should the H&C decision in this case be set aside? In my view, it must be. The impact of removal to Sri Lanka was central to the applicant's position on the application: *Vavilov*, at para 128. Her letter to Immigration Canada dated June 25, 2020 stated that the main reason she was applying for H&C relief was to avoid living with painful memories in Sri Lanka. That hardship was also prominent in her counsel's written submissions.

[31] In addition, the officer's several errors in the assessment of the applicant's medical issues were fundamental to the officer's overall decision to reject the applicant's request for permanent residence with an exemption on H&C grounds: *Vavilov*, at para 100.

[32] I also note that the officer found that it was in the best interests of the applicant's cousin's very young child that she stay in Canada.

[33] In the circumstances, the outcome of the applicant's H&C application could be different with an assessment of the impact of removal on her mental health using lawful reasoning. It will be another officer's role to conduct that assessment on redetermination. I note that these Reasons should not be taken as endorsing any particular outcome of that redetermination.

[34] I therefore conclude that the decision was unreasonable, applying *Vavilov* principles and the requirements for a proper assessment of mental health evidence in *Kanthasamy* and its progeny.

[35] The decision will be set aside. As a result of this conclusion, I do not need to consider the rest of the applicant's submissions.

[36] The applicant requested additional relief. She submitted that the Court should:

a) grant her request for permanent residence (requested at the hearing only);

b) prohibit her removal from Canada pending the redetermination of her H&C application; and

c) award costs in her favour.

[37] For the reasons below, these proposed terms will not be part of the Court's Order.

[38] The applicant is correct that the Court has the ability to make an Order in the nature of *mandamus* or a directory order: *Vavilov*, at paras 139-142; *Blue v. Canada (Attorney General)*, 2021 FCA 211, at paras 49-51; *Fono v. Canada Mortgage and Housing Corporation*, 2021 FCA 125, at para 13. However, this is not a case for such an Order. Parliament has assigned decisions under *IRPA* subsection 25(1) to the Minister or a delegate. The circumstances of this case do not require an urgent remedy and the circumstances of this application do not lead to an "inevitable" result: *Vavilov*, at para 142.

[39] On the second request, the respondent noted that a pending H&C application does not automatically stay an applicant's removal: see for example, *Ledshumanan v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1463, at paras 46 and 76. If her removal is sought before the redetermination, the applicant may seek a stay in the usual manner.

[40] Lastly, there are no special circumstances for costs under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. See *Amanuel v. Canada (Citizenship and Immigration)*, 2021 FC 662, at para 63; *Garcia Balarezo v. Canada (Citizenship and Immigration)*, 2020 FC 841, at para 49; *Dukuzeyezu v. Canada (Citizenship and Immigration)*, 2020 FC 1017, at paras 37-38.

III. Conclusion

[41] The application is allowed. Neither party proposed a question to certify for appeal and none will be stated.

JUDGMENT in IMM-4193-21

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision of the senior immigration officer dated June 4, 2021, is set aside and the matter remitted for redetermination by another officer. The applicant shall be permitted to update or supplement the application with additional evidence or submissions.
2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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