Federal Court Cour fédérale

Date: 20231010

Docket: IMM-8122-22

Citation: 2023 FC 1349

Toronto, Ontario, October 10, 2023

PRESENT: Madam Justice Go

BETWEEN:

BALYAR GROVER
NAND GROVER

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Balyar Grover and his spouse, Nand Grover, are 81 and 77 years old, respectively. They are citizens of Afghanistan and are Afghan Sikhs by ethnicity and religion.

[2] The Applicants entered Canada on February 29, 2012 and made a claim for refugee protection. The Refugee Protection Division [RPD] refused their refugee claim on November 13, 2013 and the Court denied leave on April 2, 2014. On April 22, 2016, the Applicants applied for permanent residence on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Their application was refused on October 17, 2016.

[3] On June 20, 2022, the Applicants submitted a second H&C application. This application was refused on August 4, 2022 by a senior immigration officer [Officer] [Decision].

[4] The Applicants seek judicial review of the Decision. I grant the application as I find the Officer unreasonably relied on the Temporary Suspension of Removal [TSR] to Afghanistan to discount the weight given to family reunification, and inadequately assessed the best interests of the child [BIOC].

II. Preliminary Issues

[5] When reviewing the Certified Tribunal Record [CTR] and the Applicants' Application Record [AR], I noticed several significant discrepancies between the two sets of documents. First, the Affidavit filed by the Applicants in support of their leave for judicial review [Applicants' Affidavit] contains a substantial amount of information that does not appear to be contained in the CTR. Second, certain exhibits attached to the Applicants' Affidavit include copies of documents that also do not appear in the CTR.

[6] I issued a Direction to the parties to seek their submissions on the discrepancies. Specifically I asked the parties to confirm if any of the new information I noted was before the Officer, and whether the Court should consider any of the information that was not before the decision-maker. I received responses from counsel for both parties.

[7] In a letter dated September 7, 2023, counsel for the Applicants, who also represented the Applicants in the H&C application, confirmed that two sets of documents in the AR were not before the Officer, namely:

a. Letter dated June 25, 2021 at page 31 of the AR from Gurdwara Jot Parkash Sahib, a Sikh Temple in Canada that the Applicants regularly attend [Gurdwara Letter], was not put before the Officer because "the applicant inadvertently forgot to attach" the Gurdwara Letter.

b. The country conditions documents at pages 36 to 57 of the AR were not put before the Officer. Counsel noted, "[t]he information was also available in the RPD's National Document Package for Afghanistan and the Applicant believed disclosure of such evidence would be unnecessary."

[8] The country conditions documents in question depict the harsh circumstances facing Afghan Sikhs, a minority group in Afghanistan, and their dwindling population in that country due to their mass exodus in recent years.

[9] Counsel for the Applicants submitted that the Gurdwara Letter "only supports the information provided in the application and does not introduce new information or argument in support of the application." With respect to the country conditions documents, counsel submitted that such evidence "does not introduce any new information which was not already available to

the Respondent", and that "it was common information through the media that a mass exodus occurred in Afghanistan." Finally, counsel argued that the exhibits provided in the AR "only reaffirm the information already available to the officer and does not prejudice the Respondent in any way."

[10] Counsel never addresses my question regarding any of the new evidence contained in the body of Applicants' Affidavit itself.

[11] In response, counsel for the Respondent provided a brief letter asking the Court to find the contents of the Applicants' Affidavit, and the documents that were not before the Officer, inadmissible and give them no weight.

[12] While certain contents of the Applicants' Affidavit were before the Officer, the bulk of it was not. From what I could gather – since neither of the parties made any specific submissions on this matter – 32 out of the 50 substantive paragraphs of the Applicants' Affidavit contain, in full or in part, information that cannot be traced back to the CTR.

[13] Apart from providing further background information about the Applicants, these paragraphs contain new evidence that portrays a disturbing picture facing the minority group of Afghan Sikhs, to which the Applicants belong. I acknowledge however that there was some reference to the conditions facing Afghan Sikhs in the supporting letters from the Applicants' friends and fellow members of the Gurdwara.

[14] Notwithstanding counsel's assertion that the evidence is "common knowledge", I agree with the Respondent that on a judicial review, documents that were not before the Officer are generally inadmissible: *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2020 FC 791, at para 28. I also note the Federal Court of Appeal confirmed in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20 that, generally speaking, a party to an application for judicial review cannot submit new evidence.

[15] As such, I decline to consider the following paragraphs in the Applicants' Affidavit, in whole or in part: paras 4-31, 43, 44, and 49. For the same reasons, I decline to consider the documents at pages 31, and 36-57 of the AR.

[16] I note that when seeking leave for judicial review, the Applicants rely on the Officer's failure to consider the Gurdwara Letter. The Applicants argue that the Officer ignored the evidence, when in fact the evidence was never submitted in the first place. In effect, the Applicants were granted leave in part due to an argument that was not grounded in evidence.

[17] As I have recently noted in *Anvar v Canada (Minister of Citizenship and Immigration)* 2023 FC 1194 [*Anvar*]:

> [13] I am not suggesting that the Applicant seeks to mislead the Court by including statements in the Affidavit that are not based on the evidence in the record. However, in my view, counsel for the Applicant ought to have exercised more care to ensure there are no inaccuracies or misleading statements in the Affidavit. Being accurate with one's factual assertion is an important part of effective advocacy, and is an integral part of counsel's responsibility as an officer of the Court.

[18] The same comment noted above equally applies to the case at hand, if not more so, as unlike *Anvar*, where a different counsel represented the applicant in his prior immigration proceeding, the Applicants in this case are represented by the same counsel throughout.

[19] Generally speaking, in the eyes of the Court, there is no distinction between an applicant and their counsel. Counsel's action or inaction, as the case maybe, is often attributable to the applicant. This maybe so even for applicants who, due to circumstances beyond their control, rely fully on their counsel to assist with their application. Some applicants do not have the knowhow to compile and file their own application, let alone decide what evidence to submit and what arguments to make. They too often bear the consequences of their counsel's actions.

[20] In this case, the Applicants are elderly, have limited to no formal education and lack proficiency in either of the official languages of Canada. While I recognize that the Applicants may not possess the capacity to file an online H&C application without assistance, I am nevertheless bound by the case law to only review the evidence that was submitted to the Officer on the Applicants' behalf.

[21] In light of the circumstances of the case before me, I offer the following observations as a reminder to counsel. First, when representing vulnerable applicants, including those who are elderly and lacking proficiency in English and French, counsel carries a heightened responsibility of ensuring that the record before the Court is consistent with that before the Officer.

[22] Second, while accepting that applicants always have the final say on how to proceed with their legal matter, counsel must ensure that their clients are fully informed when deciding what evidence to submit in support of their applications. Consistent with their obligation as a member of the legal profession and an officer of the Court, counsel must always exercise due diligence in preparing applications on their clients' behalf.

[23] Finally, in the event of any error and omission, counsel should act with candour, fairness, courtesy, and respect in all their dealings with the Court and alert the Court to such error and omission. Doing so is not only in their clients' interests but is also mandated by the Rules of Professional Conduct set out by their governing body.

III. Issues and Standard of Review

[24] The Applicants raise the following issues:

A. Was the Officer's conclusion on establishment contradictory and reasonable?
B. Did the Officer err in their hardship analysis and family reunification?
C. Did the Officer err by failing to consider the BIOC?
D. Did the Officer err in relying on the TSR and ignoring the current country conditions in Afghanistan?
E. Did the Officer fail to conduct a global assessment of the H&C factors?

[25] The parties agree that the standard of review is reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[26] 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 Decision is unreasonable: *Vavilov* at para 100. 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.

IV. Analysis

[27] The determinative issue in this case is the Officer's reliance on the TSR in their assessment of family reunification and BIOC factors.

[28] The Applicants have been residing in Canada with their son and grandchildren since 2012. The Applicants submitted letters from their grandchildren with their H&C application. These letters described the Applicants being an "integral part" of their family and their lives, and the Applicants' roles in all of their lives as "irreplaceable." They also described the positive impact that the Applicants have on the grandchildren by imparting their beliefs and values, and by helping reduce their stress level while providing the grandchildren with a sense of emotional security. The Applicants' youngest grandson, who is now 13 years old and the subject of the BIOC, was two years old when the Applicants first came to Canada. The Applicants have been looking after him since. The minor child wrote about his strong relationship with the Applicants who teach him about his religion and the Applicants' importance to him, as he has no other grandparents.

[29] The Officer gave family reunification minimal weight. Specifically, the Officer found that given the TSR, it is likely the Applicants will remain with their family in Canada for a "long duration." The Officer also determined that the Applicants' son can sponsor them under the Parent and Grandparent [PGP] Sponsorship Program, which the Officer noted would be a more "applicable route."

[30] With respect to the BIOC, the Officer afforded the BIOC analysis some weight, but noted that given the TSR, the Applicants will be able to remain in Canada to provide childcare to the minor child. To the Applicants' point that they provide their grandchild with cultural and religious knowledge, the Officer found that the Gurdwara and grandchild's father could provide the grandchild with similar knowledge.

[31] *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] states that section 25 of the *IRPA* is intended to offer equitable relief where there are "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'": *Kanthasamy*, at paras 13, 21.

[32] The Applicants submit that unlike the Supreme Court's guidance in *Kanthasamy*, the Officer's Decision was selective, categorical, and based on a checklist, instead of weighing and considering "*all* the relevant factors" before them: *Kanthasamy* at para 25. I agree.

[33] As Justice Ahmed noted in *Salde v Canada (Minister of Citizenship and Immigration)*, 2019 FC 386:

> [21] An H&C application made under section 25(1) of the IRPA is no ordinary application. This provision ensures that the Minister has the flexibility necessary to mitigate against rigid laws. The words of the Honourable Justice Abella of the SCC in *Kanthasamy* are words that cannot be easily forgotten:
>
> > [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
> >
> > [Emphasis in original.]
>
> [22] When officers are entrusted with the responsibility of analysing H&C applications, they must determine if the application would "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), [1970] I.A.B.D. No. 1, 4 IAC 338 (Imm App Bd) at 350). Indeed, the SCC has directed that an H&C analysis must consider all relevant factors (*Kanthasamy* at para 25). In other words, a reasonable H&C analysis is not confined to a checklist.
>
> [23] Yet this Officer's analysis does nothing more than robotically assess a checklist of factors. Consequently, the analysis is confined in scope to categorical elements and a selective review of the evidence. Indeed, wherever the evidence contained compassionate factors, those factors do not appear in the reasons. It is as if the Officer, going through a checklist of establishment, hardship, family reunification and some BIOC, could not fit in the compassionate factors and so they were disregarded. But *compassionate* factors do not always fit neatly in a checklist or

> template. And the flexibility provided by this provision was never intended to do so.

[34] In this particular case, the Officer failed to properly consider the issue of family reunification by finding that since a TSR is in place, the Applicants will be able to remain in Canada. The unreasonableness of the Officer's weighing of this factor is further accentuated, as the Officer appeared to accept the Applicant's claim that they do not know the whereabouts of their other children and that the only family they have is in Canada. In failing to take into consideration the Applicants' ties with their family in Canada and discounting this factor due to the existence of a TSR, the Officer erred by failing to consider ***all*** relevant factors, and unreasonably discounted one of the key compassionate factors required in an H&C analysis.

[35] The Applicants also take issue with the Officer's conclusion that an "applicable route" for them would be through the PGP sponsorship scheme. The Applicants argue, and I agree, that the H&C application should be assessed on its own merits and not based on alternative available programs. Besides, the Applicants themselves cannot file an application under the PGP scheme, and there is no evidence with regard to their son's eligibility and willingness to submit such a sponsorship application before the Officer. As such, I find the Officer reached this conclusion based on speculation and not on the evidence before them.

[36] The Respondent argues the Officer's assessment of family reunification was reasonable, given the evidence presented by the Applicants. With respect, this argument lacks merit, as the Officer did not discount family reunification based on the insufficiency of evidence.

[37] Similarly, I find the Officer unreasonably relied on the TSR when assessing the BIOC.

[38] Section 25 of the *IRPA* mandates consideration of the BIOC, and *Kanthasamy* confirmed that this includes "such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections": at para 34.

[39] The Applicants argue that the Officer's BIOC analysis was "superficial" and did not meet the Officer's requirement to demonstrate they are alert, alive and sensitive to the BIOC.

[40] The Respondent submits that the Officer was alert, alive and sensitive to the BIOC, and that the Officer acknowledged it is an important factor that should be given significant weight. However, given the evidence before them, the Respondent argues that the Officer reasonably gave this factor some weight.

[41] I am not persuaded by the Respondent's submission, as it is not enough for an officer to simply state they are alert, alive and sensitive to the BIOC; the officer must in fact do so as per *Kanthasamy*, at para 34.

[42] In this case, the Officer noted the support letter from the minor grandson that demonstrated his close relationship with the Applicants. The Officer also noted that the Applicants provide childcare for their grandson. The Officer then concluded that the Applicants

can remain in Canada with the TSR in place, and that the child may learn about their culture and religion from other sources.

[43] In coming to this conclusion, the Officer did not once identify what would be in the best interests of the minor grandson, who has built a close relationship with his grandparents for over 10 years. Nor did the Officer assess how the grandson's best interests would be affected if the Applicants cannot stay in Canada once the TSR is lifted.

[44] I would add that in finding that the Applicants could remain in Canada to provide childcare, the Officer reduced the relationship between the Applicants and their minor grandchild to one that is purely transactional, as if the value of the Applicants to their grandson is measured only by the childcare they provide. The Officer thus overlooked the child's basic human need for bonding with his grandparents. The Officer adopted the same transactional lens to conclude that others could fill the role of imparting information to the child the knowledge of culture and religion, notwithstanding the child's expressed desire to spend as much time with the Applicants as he can, as they are his ***only*** grandparents.

[45] In conclusion, I find the Officer conducted an inadequate BIOC and was not being alert, alive and sensitive to the BIOC, contrary to their assertion.

[46] For these reasons, I find the Decision unreasonable.

V. Conclusion

[47] The application for judicial review is granted.

[48] There is no question for certification.

JUDGMENT in IMM-8122-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted and the matter sent back for redetermination by a different officer.
2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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