Federal Court  Cour fédérale

Date: 20231020

Docket: IMM-4325-22

Citation: 2023 FC 1396

Ottawa, Ontario, October 20, 2023

PRESENT: The Honourable Chief Justice Crampton

BETWEEN:

BHAGWAN DASS SHARMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this proceeding, the principal applicant and his spouse seek judicial review of a decision rejecting their application for permanent residence from within Canada (the **"Decision"**), on humanitarian and compassionate (**"H&C"**) grounds.

[2] Mr. and Mrs. Sharma (the **"Applicants"**) maintain that the Decision was unreasonable on several grounds. Among other things, they submit that the Decision did not meaningfully engage with their particular circumstances that went to the root of their application. Those circumstances

involve the tragic death of their son in India and their consequential need for various types of support from their daughter in Canada, who is their only other child.

[3] I agree that the Decision was unreasonable on that particular ground. Accordingly, the Decision will be set aside and remitted to a different decision maker for reconsideration.

II. Background

[4] Mr. and Mrs. Sharma are citizens of India, aged 68 and 60, respectively. They have been residing in Canada with their daughter since December 2017. Mr. Sharma has a multiple-entry extended stay temporary resident visa (**"Super Visa"**) that expires in May 2024. Mrs. Sharma also had a Super Visa that was set to expire on September 2, 2022. Her present status in Canada is unclear.

[5] In July 2020, the Applicants' initial application for permanent residence from within Canada on H&C grounds (an **"H&C Application"**) was denied. That application was made pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [**IRPA**].

[6] The following year, they submitted a second H&C Application, based primarily on the death of their only son and their consequent need to live with their daughter in Canada. According to their application, their son went missing and was found in a local river after a three-day search in August 2014. The Applicants added that this life-changing tragedy had a profound adverse impact on their mental, emotional, physical and financial well-being. In these circumstances, and having regard to "cultural norms" that contemplate parents living with one or

more of their children in their older years, they wished to remain in Canada with their only remaining child.

[7] In support of this second H&C Application, the Applicants also made submissions with respect to their establishment in Canada, the hardships that would be associated with their return to India, the uncertainty associated with obtaining permanent residency pursuant to the Family Sponsorship program, and the costs and uncertainty associated with maintaining their status under the Super Visa program.

[8] The Applicants also submitted a psychological report prepared by Dr. J. Pilowsky. Among other things, that report stated that the Applicants were at "very high risk for psychological collapses if unable to remain with their daughter" in Canada.

III. The Decision

[9] In the Decision, written by a Senior Immigration Officer (the **"Officer"**) in the Department of Immigration, Refugees and Citizenship Canada, the Officer gave "some weight" to the Applicants' establishment in Canada and the support that their daughter would be able to provide to them in Canada. The Officer also gave "modest weight" to the Applicants' "mental health considerations tied to the tragic death of their only son," as described in Dr. Pilowsky's psychological report.

[10] However, the Officer found that there would be minimal hardship associated with their return to India.

[11] In summarizing the Decision, under the heading “Global Assessment”, the Officer rejected the Applicants’ request under s. 25 of the IRPA after finding that their situation “is similar to many ageing parents who had their children relocate to Canada as permanent residents and later become citizens of Canada.”

IV. Issue

[12] The only issue on this judicial review application is whether the Decision was unreasonable.

V. Relevant Legislation

[13] Section 25 of the IRPA provides an exemption from what would otherwise be the ordinary operation of that legislation, if the Minister of Immigration, Refugees and Citizenship is of the opinion that such an exemption is justified by H&C considerations. Absent this provision, foreign nationals would ordinarily have to apply for permanent residence in Canada from outside the country. The full text of s. 25 is set forth in the Annex to these reasons.

VI. Standard of Review

[14] It is common ground between the parties that the standard of review in this proceeding is whether the Decision was unreasonable.

[15] When reviewing a decision on a standard of reasonableness, the Court must approach the decision with “respectful attention” and consider the decision “as a whole”: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 84–85 [***Vavilov***]. The Court’s

overall focus will be upon whether the decision is appropriately justified, transparent and intelligible. In other words, the Court will consider whether it is able to understand the basis upon which the decision was made and then to determine whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, above, at paras 86 and 97.

[16] A decision which is appropriately justified, transparent and understandable is one that reflects "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and the law that constrain the decision maker": *Vavilov*, at para 85. It should also reflect that the decision maker "meaningfully grapple[d] with key issues or central arguments raised by the parties": *Vavilov*, at para 128.

[17] It is not the role of the Court to make its own determinations of fact, to substitute its view of the evidence or the appropriate outcome, or to reweigh the evidence. The Court's function is solely to assess whether the administrative tribunal's determinations and reasoning are reasonable: *Vavilov*, above, at paras 125–126; *Pascal v Canada (Citizenship and Immigration)*, 2020 FC 751 at para 7.

[18] Given the "highly discretionary and fact based nature" of decisions made under s. 25 of the IRPA, immigration officers ordinarily will have a broad range of acceptable and defensible outcomes available to them: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 61 [***Baker***]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA

113, at para 84; *Kaur v Canada (Citizenship and Immigration)*, 2022 FC 1483, at para 13 [***Kaur***]; *Freund v Canada (Citizenship and Immigration)*, 2022 FC 746, at para 18.

VII. Analysis

A. *General Principles*

[19] An applicant for relief under s. 25 of the IRPA must establish circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 21 [***Kanthasamy SCC***], quoting from *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970) 4 IAC 338, at p 350.

[20] In assessing whether such circumstances exist in any given case, it is important to keep in mind that s. 25 was enacted to address situations in which the consequences of deportation "might fall *with much more force on some persons … than on others,* because of their particular circumstances …": *Kanthasamy SCC*, above, at para 15 (emphasis added), quoting the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Immigration Policy*, 30-1, No 49 (September 23, 1975) at 12.

[21] Consequently, it is not sufficient to simply establish the existence or likely existence of misfortunes, relative to Canadian citizens and permanent residents of Canada: *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265, at para 18 [***Huang***].

[22] Rather, it is incumbent upon applicants for the exceptional relief contemplated by s. 25 to demonstrate the existence of misfortunes or other circumstances that, taken as a whole, resonate with materially greater force, *"relative to those of other applicants who apply for permanent residence from within Canada or abroad"*: *Huang*, at para 20.

[23] In assessing whether an applicant has established sufficient H&C considerations to warrant a favourable exercise of discretion under s. 25 of the IRPA, *all* of the relevant facts and factors advanced by the applicant must be considered and weighed: *Kanthasamy SCC*, above, at para 25.

B. *Hardship upon return to India*

[24] The Applicants maintain that it was unreasonable for the Officer to find that the Applicants had not "established an adequate link between the country condition[s] evidenced and [their] personal circumstances." In this regard, the Applicants rely on *Kaur*, at paras 16-20. However, that case is distinguishable. This is because the Court there determined that "the Applicant's classification as a widow was enough to place her as a member of a discriminated group, and consequently, *to demonstrate on a reasonable inference* that she may face discriminatory action if returned to India": *Kaur*, at para 20 (emphasis added). The Court was able to make this inference after accepting that (i) the Applicant's extended family members had cut ties with her after the passing of her late husband, (ii) widowhood in India leads to a state of "social death," and (iii) widows are "expected to live in an ashram (shelter home)" following their husband's death: *Kaur*, at para 16.

[25] By contrast, in the present case, the Officer found that "the numerous letters of support from the [Applicants'] neighbours and family in India point to [their] strong network of support" in India. Moreover, the Officer found that the evidence provided by the Applicants in support of their position regarding the challenges faced by elderly individuals in India was based on "a few news articles" and was "vague" in nature. Rather than supporting a reasonable inference in relation to those challenges, the evidence simply indicated that the Applicants "might" be adversely impacted by the conditions they identified.

[26] The onus was on the Applicants to demonstrate that they would *likely* be affected by adverse country conditions such as discrimination. They could have done so by providing sufficient evidence to support a reasonable inference in this regard: *Kanthasamy SCC*, at para 56 (emphasis added). Given the findings made by the Officer, it was not unreasonable for the Officer to conclude that they failed to meet this burden.

[27] Subject to my finding below regarding the significance of the death of the Applicants' son, it was also not unreasonable for the Officer to find that the evidence of hardship provided by the Applicants did not rise to the level of being "unusual" relative to others who are similarly situated to them. Nor was it unreasonable for the officer to observe that the purpose of s. 25 of the IRPA "is not to compensate for the difference in [the] standard of living" between Canada and an applicant's country of origin.

C. *Dr. Pilowsky's psychological report*

[28] The Applicants submit that the Decision was also unreasonable because it was silent regarding the contents and conclusions of Dr. Pilowsky's report.

[29] I disagree. It is readily apparent from the following passage in the Decision that the Officer directly engaged with the essence of Dr. Pilowsky's report:

> Dr. Pilowsky's diagnoses the applicants to be suffering from post traumatic stress disorder attributed to the number of tragic losses that they have suffered in their lives in India. I am deeply sympathetic that both of the applicants are experiencing their respective mental health issues tied to the tragic death of their son in 2014, and recognize that this must be extremely difficult for them and their daughter. As a human being I deeply empathize with the applicants for this tremendous loss. I acknowledge and empathize that such a loss carries a weight on a parent's heart.

[30] The Officer directly proceeded from the foregoing to give "modest weight" to the Applicants' "mental health considerations tied to the tragic death of their son." In my view, this was not unreasonable. Given the statements made in the above-quoted passage, the Officer was not required to address Dr. Pilowsky's report in greater detail.

[31] In essence, the Applicants are requesting the Court to reweigh Dr. Pilowsky's evidence and to give it greater weight. That is not the role of the Court: see paragraph 17 above.

[32] In oral submissions, the Respondent raised questions regarding the reliability and credibility of Dr. Pilowsky's report. Among other things, the Respondent maintained that the

report “essentially recited the Applicants’ evidence,” was not subject to any form of validation, and “appears at times to cross the line separating expert opinion from advocacy.”

[33] Dr. Pilowsky is well known to the Court. She has a long history of providing opinions that applicants for relief under the IRPA will suffer post-traumatic stress disorder if they are required to return to their country of origin. Indeed, the Court has noted the substantial similarity in the language that has been included in Dr. Pilowsky’s reports: see e.g., *Vildoza v Canada (Citizenship and Immigration)*, 1988 CanLII 8868, at para 15.

[34] Instead of inviting the Court to discount Dr. Pilowsky’s evidence based on generalized aspersions, the Respondent may wish to conduct more rigorous analysis to support its submissions. Given the recent evolution of data analytics, this may not be a particularly significant burden.

D. *Reference to the possibility of submitting an application under the Family Class sponsorship program*

[35] The Applicants submit that it was unreasonable for the Officer to have found that their daughter has the option of submitting an application to sponsor them under the Family Class sponsorship program. The Officer added that there was little evidence to indicate that the Applicants’ daughter had previously submitted a sponsorship application.

[36] These findings were made immediately following the Officer’s finding that the Applicants’ financial reliance on their daughter was a positive factor in their application. In that particular context, I do not consider the Officer’s statements to have been unreasonable. The

Officer simply appears to have been responding to the Applicants' submissions that the uncertainty in the selection process under the Family Class Sponsorship should be considered as a further positive factor in the assessment of their application.

E. *The Applicants' personal circumstances*

[37] The Applicants note that, in the "Global Assessment" section at the end of the Decision, the Officer made findings that were unreasonable. I agree.

[38] The problematic passage of the decision is as follows:

> I find the applicants' situation is similar to many ageing parents who had their children relocate to Canada as permanent residents and later become citizens of Canada. Family separation is an inevitable reality when a family member makes the decision to immigrate abroad. In this particular case, the applicants' daughter made the decision to leave India and immigrate to Canada. While it is understandable that the applicants deeply miss their daughter and feel lonely by themselves in India, I find they would have to, at some degree anticipated such circumstances, given their dedication to furthering their daughter's education and providing her with the best opportunities. As such, I do not find that this factor justifies the granting of permanent resident status under humanitarian and compassionate grounds to the applicants; in particular, when there are other immigration options available to them to facilitate family reunification and extend their temporary stays in Canada.

[39] In my view, it was unreasonable for the Officer to have found that the Applicants' situation is similar to many ageing parents whose children have relocated to Canada. It was also unreasonable to suggest that the Applicants should have anticipated their present circumstances.

[40] The tragic and untimely death of their son, who was their only other child, was a unique and important factor that should have been addressed in greater detail in the Decision.

[41] That factor was at the heart of the Applicants' submissions in support of their application. In this regard, the Applicants' submissions in support of their application specifically identified the unexpected death of their son as being the "circumstances beyond their control" that provided the basis for their application. The Applicants added that, if that "tragedy had never happened, then we would have lived with our son in India."

[42] Notwithstanding those submissions, the death of the Applicants' son was only addressed (i) as a background fact at the outset of the Decision, (ii) in a very brief statement in the course of dismissing the Applicants' submissions regarding the hardship they allegedly would face upon their return to India, and (iii) in discussing Dr. Pilowsky's report.

[43] Given the central importance of the death of the Applicant's son to their application, the failure of the Decision to more fully address the Applicants' submissions was unreasonable. This failure was exacerbated by the complete absence of any mention of that fact in the "Global Assessment" section of the Decision. It was further exacerbated by the Officer's findings that the Applicants' situation is similar to that faced by many ageing parents whose children have relocated to Canada, and that they ought to have anticipated their current situation when their daughter initially moved to Canada.

[44] Take together, the foregoing strongly suggests that the Officer misapprehended or did not fully appreciate (i) the significance of the death of the Applicants' son (*Vavilov*, at para 128), and (ii) how the unique circumstances of his death distinguished the Applicants from others who apply for relief under s. 25.

[45] In the overall context of the Applicants' application, those circumstances had the potential to resonate with greater force, relative to those of other applicants who apply for permanent residence from within Canada or abroad: see para 22 above. The failure of the Officer to more fully address those circumstances resulted in the Decision being insufficiently justified, and falling outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, above, at para 86.

VIII. Conclusion

[46] For the reasons set forth immediately above, the Decision will be set aside and remitted to a different decision maker for reconsideration.

[47] At the end of the hearing of this Application, the parties stated that no serious question of general importance arises from the facts and issues in this case. I agree. Accordingly, no question will be certified pursuant to paragraph 74(d) of the IRPA.

JUDGMENT in IMM-4325-22

THIS COURT'S JUDGMENT is that:

1. The Decision, dated April 22, 2022, rejecting the Applicants' request under s. 25 of the IRPA is set aside and remitted to a different decision maker for reconsideration.
2. There is no question for certification pursuant to paragraph 74(d) of the IRPA.

"Paul S. Crampton"
Chief Justice

Annex - Subsection 25(1) of the IRPA

Humanitarian and compassionate considerations – request of foreign national

25(1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25(1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

FEDERAL COURT

SOLICITORS OF RECORD

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