Federal Court  Cour fédérale

Date: 20240228

Docket: IMM-4905-23

Citation: 2024 FC 332

Ottawa, Ontario, February28, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

RAJ KUMAR DARGAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Raj Kumar Dargan [the "Applicant"], is seeking a Judicial Review under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA] concerning the rejection of his permanent resident application on humanitarian and compassionate grounds (H&C). The Judicial Review is granted for the following reasons.

[2] The Applicant is a 76-year-old citizen of India. He sought an exemption from the ordinary requirements of IRPA on H&C grounds. As his potential sponsors, his son and

daughter-in-law do not yet fully meet the three-year income requirement to sponsor him under the family class sponsorship program. Further, the Applicant submitted that the sponsorship lottery system that is currently in place brings uncertainty as to whether he can ever be sponsored to apply for permanent residence. The Applicant is a widower who no longer has a home in India. His two sons live in Canada and his only remaining sibling, a sister, is busy caring for her seriously ill husband.

[3] The Applicant lives with one of his sons, his daughter-in-law and the couple's twin daughters who are eight years old. The Applicant lived with his son and daughter-in-law even in India and after the son got married. The Applicant came to Canada as a visitor and has lived with his son's family. He is the primary caregiver to the twins as both parents are working professionals.

[4] The Senior Immigration Officer (the "Officer") refusing the Applicant's application, made the following key findings in his reasons:

> There is insufficient evidence before me to suggest that the applicant's relationship with his son and his grandchildren in Canada is characterized by a high degree of emotional or financial interdependence of such that he would be unable to return to India and re-establish his life there or that in doing so would result in hardship. As stated, the applicant's sister currently resides in India and insufficient evidence has been presented to indicate that she would be unable or unwilling to assist him with resettlement upon his return.
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> …
>
> I have considered the best interests of the applicant's grandchildren-Amaira and Aryana who are eight years old. I acknowledge that the applicant cares for his grandchildren; however, I am not satisfied that other arrangements could not be made to take care of these children. Many families are faced with these child care arrangements in Canada. While it may be difficult

> for the grandchildren to be separated from their grandfather, they will continue to have the care and support of their parents. Whatever adjustments the grandchildren will have to make to their lives in Canada, they will do so with the support of their parents. In terms of the best interests of the children, I am satisfied that the best interests of the children would be met if they continued to benefit from the personal care and support of their parents. As stated above, relationships are not bound by geographical locations and while being physically separated from his grandchildren in Canada will cause some dislocation, it does not mean that they will be unable to contact one another. India is easily reachable by telephone and the cost of telephonic communications should accordingly not be too expensive. If it proves to be expensive, communications can be continued by letters, or various social media outlets. While I am not suggesting that either of these types of communications will be entirely satisfactory substitutes for the applicant's personal presence, this may be the only alternative short of actual visits to India. Furthermore, insufficient evidence has been submitted to indicate that there are barriers to the parents or the grandchildren visiting the applicant in India should the family so desire.

II. Preliminary Matter

[5] As the Respondent has pointed out, materials filed on Judicial Review that were not before the Officer should normally not be considered unless they fall within established exceptions. No such exception exists here, so I am not considering the materials on the Applicant's Record pages 49 to 51 (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22 at para 19).

III. Issues and Standard of Review

[6] The only issue before me is whether the Officer's decision was reasonable.

[7] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Canada (Minister of Citizenship*

and Immigration) v Vavilov, 2019 SCC 65, at paras 12-13 and 15 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras 8, 63 [*Mason*].

[8] I have started by reading the reasons of the decision-maker in conjunction with the record that was before them holistically and contextually. As guided by *Vavilov*, at paras 83, 84 and 87, as the judge in reviewing court, I have focused on the reasoning process used by the decision-maker. I have not considered whether the decision-maker's decision was correct, or what I would do if I were deciding the matter itself: *Vavilov*, at para 83; *Canada (Justice) v D.V.*, 2022 FCA 181, at paras 15 and 23. It is not this Court's role to reweigh the evidence.

[9] A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision-maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33 and 61; *Mason*, at paras 8, 59-61 and 66. For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention.

IV. Legislative Overview

[10] The following section of the IRPA is relevant:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for	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

permanent resident status and who is inadmissible — other than under section 34, 35, 35.1 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, 35.1 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.

résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35, 35.1 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, 35.1 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.

V. Analysis

A. *Was the Officer's decision reasonable?*

[11] H&C applications are exceptional in the sense that an applicant requests the Minister to exercise Ministerial discretion to relieve them from requirements in the IRPA. The Supreme Court of Canada in Kanthasamy v Canada (Minister of Citizenship and Immigration), 2015 SCC 61 [Kanthasamy], citing Chirwa v Canada (Minister of Citizenship and Immigration) (1970), 4 IAC 338, confirmed that the purpose of this humanitarian and compassionate discretion is "to offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (Kanthasamy at para 21).

[12] I agree with my colleague, Madam Justice Sadrehashemi in Tuyebekova v Canada (Citizenship and Immigration), 2022 FC 1677 at para 11 that the purpose of humanitarian and

compassionate discretion is to "mitigate the rigidity of the law in an appropriate case," and there is no limited set of factors that warrants relief (Kanthasamy at para 19):

> The factors warranting relief will vary depending on the circumstances, but 'officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them" (*Kanthasamy* at para 25 citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 74-75 [*Baker*]).

[13] In this case, like in every H&C case that turns on its facts, context matters. As part of the context, here are the undisputed facts before the Officer:

- the 76-year-old Applicant is a widower who has really never lived alone in India. He lived with his son and daughter-in-law after the son got married and before the son's family emigrated to Canada;
- The Applicant is the granddaughters' primary care-giver as both parents are working professionals and relatively new immigrants to Canada;
- The Applicant has no family members left in India, except for one sister who is busy caring for her terminally ill husband;
- In addition to other evidence documenting the relationship of the Applicant and his granddaughters, the medical evidence before the Officer stated that the birth of the granddaughters triggered hopefulness and positivity in him who had become depressed after he lost his wife in 2006. The doctor notes that both the Applicant, and especially the granddaughters, would suffer a "severe emotional and psychological impact" if he were to leave Canada.

[14] It is not for this Court to reweigh the evidence. However, Officers are expected to take the context of the evidence before them into account while exercising their discretion. A lip service to the various evidence, or going through different factors out of context and in a checklist-type fashion is not enough for the Officer to demonstrate that they have been alive and alert to the context of the application, and especially in this case to the best interest of the children involved.

[15] In this case, according to the medical note, the Applicant's mental health was linked to the factors that affected his family: the loss of his wife affected it negatively, and the birth of the granddaughters affected it positively. The doctor clearly identifies the family factors as the Applicant's underlying mental health issues. Rather than even engaging with this, the Officer only refers to the medical note to the extent of suggesting that the Applicant could seek further medical or psychological assistance in India because such services are available there. Nor did the Officer engage with the impact on the children's well-being in the event that their grandfather leaves even though the doctor had highlighted the impact on them to be even more significant than on the Applicant: "if Mr. Dargan is asked to leave Canada, it would have a severe emotional and psychological impact on him and especially on his granddaughters".

[16] In other words, the Officer made no reference to the medical evidence that pointed to the problems the children would suffer if the Applicant is removed from Canada. Instead, the Officer concluded that the children's parents were sufficient to mitigate any negative consequences of the loss of the Applicant. This is while the Best Interest of the Child requires a "great deal of attention" (*Kanthasamy*):

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII), [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 (CanLII), 323 F.T.R. 181, at paras. 9-12. [Emphasis added.]

[17] At the hearing, counsel for the Respondent argued that from the letter, it was not clear whether the doctor had recently treated the Applicant, and this would make it reasonable for the Officer not to give it significant weight. However, the Court cannot take into account counsel's speculation for what might have been a factor for the Officer when the Officer was silent on the issue.

[18] This Court has been consistent in focusing on the facts of every case in assessing the H&C factors. It is in this context that I disagree with the Respondent's characterization of this Court's jurisprudence that only when a child is ill or has special needs and/or their parents are unable to care for them, the additional care provided by a grandparent triggers a favourable H&C factor. If the child's illness has been an additional factor, it is a mischaracterization to view it as a prerequisite for the best interest of the child. In this case, there was a medical document that pointed to the severity of a psychological impact on both the Applicant and the children that was simply ignored. I therefore find that the Respondent's reliance on *Kaur v Canada (MCI),* 2022 FC 686 at para 37, *Muti v Canada (Citizenship and Immigration),* 2022 FC 1722 at para 28 and *Syed v Canada (Citizenship and Immigration)*, 2022 FC 398 at para 29, where there was no evidence of medical or psychological impact on anyone, to have been misplaced.

[19] I find that by not engaging with the medical note, the Officer ignored a material evidence and has therefore not been alert and alive to the best interest of the children involved in this case. This factor is enough to render the entire decision unreasonable. It is therefore unnecessary for me to deal with the other factors raised by the Applicant.

VI. Conclusion

[20] The Officer's decision is unreasonable, as it does not exhibit the requisite degree of justification, intelligibility, and transparency. The application for judicial review is granted and the decision set aside.

[21] Neither party proposed a question for certification and I agree that none arises in this matter.

JUDGMENT IN IMM-4905-23

THIS COURT'S JUDGMENT is that

1. The Judicial Review is granted. The matter is remitted for redetermination by a different Officer.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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