Federal Court  Cour fédérale

Date: 20211215

Docket: IMM-191-21

Citation: 2021 FC 1423

Toronto, Ontario, December 15, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

DARSHAN NARULA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a senior immigration officer made under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "IRPA"). The applicant, Mrs Narula, applied for permanent residence in Canada, seeking an exemption based on humanitarian and compassionate ("H&C") considerations. The officer refused her application.

[2] The applicant submitted that the officer's decision should be set aside as unreasonable under the principles set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[3] For the following reasons, this application will be allowed and the matter returned for redetermination by another officer.

[4] The applicant is a citizen of India. When she applied for H&C relief, she was 72 years old. She has three sons. All three sons, their spouses and the two grandchildren lived together in the joint family home in India until the families immigrated to Canada. All of them now live in Canada, with additional grandchildren born in Canada. The applicant has a sister who lives in India, aged 77 at the time of application, but no other immediate family there.

[5] In India, Mrs Narula was employed as a teacher and school headmistress until she retired in 2005, coincident with the birth of her first grandchild. She has been actively involved with the care of her grandchildren since that time.

[6] On May 2, 2018, Mrs Narula's husband passed away suddenly and unexpectedly.

[7] On January 29, 2019, the applicant arrived in Canada with her eldest son, his wife and two children, who travelled to Canada and landed as permanent residents that day. She has remained in Canada since that time as a visitor, living with her sons and their families in a joint family relationship in Winnipeg, Manitoba.

[8] The applicant is a primary caregiver for her grandchildren. At the time of her application in early 2020, her grandchildren were aged 14, 12, 9 and 6. Another grandchild was born in March 2020.

[9] The applicant's three sons and their respective spouses are all employed outside their homes.

[10] Mrs Narula is currently staying in Canada without status. She supported her application for permanent residence with H&C relief with submissions from her legal counsel dated January 10, 2019 (which should have been dated 2020) and a report from a Winnipeg forensic psychiatrist, Dr Jeffrey C. Waldman, MD, dated October 16, 2019.[1]

[11] The application for H&C relief was based on (i) the applicant's establishment in Canada; (ii) the best interests of the children ("BIOC"), in this case the applicant's grandchildren; and (iii) the impact of separation on the applicant, on her grandchildren and on her sons and their spouses, if the applicant had to return to India to apply for permanent residence in Canada.

I. The Officer's Decision

[12] By letter dated January 12, 2021, a senior immigration officer refused the H&C application (the "Decision").

[1] The applicant's counsel confirmed at the hearing that Dr Waldman is not related to the solicitor for the applicant.

[13] The officer gave minimal weight to the applicant's establishment in Canada. The applicant did not challenge the officer's findings on establishment.

[14] In a paragraph on the BIOC, the officer stated:

- "I do not have sufficient objective information that [the applicant's] ties or bonds to her grandchildren would have a negative impact on the well-being of these grandchildren other than the normal separation of family members";
- "Insufficient evidence has been provided that the removal of the applicant will jeopardize the best interests of the grandchildren";
- "I have insufficient evidence that these children are totally dependent upon the applicant to such an extent that her presence is required in Canada";
- "I have been provided with insufficient evidence that the level of dependency between the children and the applicant is such that it would result in hardship if separation were to occur";
- "I have insufficient evidence that these children were unable to function prior to the applicant's presence in Canada and/or that the children's mothers are unable to care for/or is unable to raise them without the assistance of the applicant"; and
- "I have insufficient evidence that these children could not continue to function in her absence".

[15] The officer stated that the applicant was not "the primary caregiver" for the children. The officer concluded that there was "no reason" that the bonds of attachment could not continue if the applicant were in India and that there was little evidence presented that she would be unable to maintain her close and supportive relationship with her grandchildren if she departs Canada.

[16] The officer discussed Dr Waldman's report (which the officer called a "psychiatric assessment report") and to certain of the facts gathered during interviews with the applicant and her family members. The officer made note of the contents of Dr Waldman's report as follows:

- In this report, Dr Waldman stated the applicant would be isolated and alone in India, as she does not have any children or other family members to take care of her. Her life revolves around helping to care for her grandchildren while her sons and their wives are working. As a result, she has a close relationship with her grandchildren and states that she cannot live without them.
- In the report, Dr Waldman stated that the applicant does not have a mental illness and her sole purpose has been to emotionally support her sons and their families. He stated that her identity revolves completely around her role within that family, in particular her role as the caregiver for her grandchildren.

[17] The officer was not satisfied that there were impediments to the applicant seeking permanent residence through a family class application. The officer observed that Mrs Narula could travel back and forth from India on a super visa. The officer found insufficient evidence that the hardships associated with requiring the applicant to seek a family class application to obtain her goal of family reunification would amount to hardship.

[18] Finally, the officer noted that when the applicant entered Canada, it was foreseeable that she might be separated from her family in the future because she did not have legal status to remain in Canada.

II. The Parties' Positions

[19] In this Court, the applicant made two principal arguments to challenge the officer's decision as unreasonable. First, the applicant submitted that the officer applied an elevated legal standard to the BIOC analysis, including an erroneous standard of hardship rather than considering the best interests of the children. The applicant further submitted that the officer made no express finding on the weight given to the BIOC and disregarded the evidence, including the evidence in Dr Waldman's report.

[20] Second, with respect to hardship the applicant herself would suffer, the applicant submitted that the officer failed to engage with the evidence in Dr Waldman's report.

[21] The respondent disagreed. The respondent situated the officer's decision in the context of certain basic principles: that there will be some hardship as a natural or usual incident of separation of family members; that an H&C application does not constitute a separate immigration route into Canada; and that the applicant's circumstances were not exceptional compared with other applicants, or other families, in a comparable position. The respondent further submitted that there was little evidence in the record about the interests of the grandchildren, which might have enabled the officer to do a more detailed analysis of the BIOC.

III. Law and Analysis

A. *Standard of Review*

[22] The standard of review of the officer's decision is reasonableness, as described in *Vavilov*. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[23] Reasonableness review begins with the reasons provided by the decision maker, which must be read holistically and contextually, and in conjunction 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. The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. 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 constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

[24] Not all errors or concerns about a decision will warrant the Court's intervention. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100.

[25] It is not this Court's role to agree or disagree with the officer's decision, or to determine the correct or proper outcome of the applicant's H&C application. The task of a reviewing court is to determine whether the officer made one or more of the kinds of errors described in *Vavilov* and if so, whether the officer's decision should be set aside as unreasonable.

B. ***Analysis of the Reasonableness of the Officer's Decision***

[26] For the following reasons, I conclude that the application for judicial review must succeed.

[27] First, I agree with the applicant that the officer failed to engage sufficiently with the expert report provided by Dr Waldman, with respect to both the impact of separation on the applicant herself and the impact of her removal on her grandchildren.

[28] This Court has held that, in law, an officer is not required to agree with the contents in expert reports, such as psychological or psychiatric reports, that are submitted with an H&C application. In addition, an officer can decide to give such reports no weight, or little weight, so long as the officer provides clear and well-founded explanations for doing so. See, for examples: *Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212 (Gascon J.), at para 24; *Jesuthasan v Canada (Citizenship and Immigration)*, 2018 FC 142 (Crampton CJ), at paras 43-44, 48; *Ahmed v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 507 (Ahmed J.), at para 24. In this case, the officer did not question the qualifications of Dr Waldman (or his colleague Dr Brown who participated in the interviews), or the methodology, contents or conclusions of the report. The officer also made no findings concerning the weight given to Dr Waldman's report.

[29] Like other critical evidence, an officer cannot ignore the key conclusions in a psychiatric expert report that provides opinions that are central to the applicant's position on the H&C application. Contents of this nature in an accepted expert report may, depending on the circumstances, constrain the officer's decision such that the important contents must be addressed in order to be responsive to the applicant's application. See *Vavilov*, at paras 90, 105 and 128; *Ahmed*, at paras 21-24; *Lecaliaj v. Canada (Citizenship and Immigration)*, 2009 FC 123 (Russell J.), at para 55.

[30] In this case, the officer did not entirely overlook Dr Waldman's report. The officer noted that Dr. Waldman's report stated that the applicant would be isolated and alone in India and that her life revolves around helping to care for her grandchildren while her sons and their spouses are working. The officer recognized that Dr Waldman found that the applicant's sole purpose has been to emotionally support her sons and their families and that her identity revolved completely around her role within the family, in particular for her role as the caregiver for her grandchildren. These references were taken from the first of three medical opinions provided by Dr Waldman in response to questions posed by the applicant's counsel. The officer recognized that Dr Waldman did not diagnose the applicant with an existing mental health issue.

[31] However, the officer did not refer to or engage with Dr. Waldman's conclusions about the interdependence of this family, the consequences of being separated from her immediate family in Canada by returning to India to make an application for permanent residence from overseas, or about whether long distance communications and occasional visits to Canada would offset the negative impacts of separation. In his answer to the first question posed, Dr Waldman found that the "emotional impact of removing Mrs Narula from her grandchildren's life would be emotionally devastating for all of them" and "much more difficult for Mrs Narula to recover from, because of her age and the social isolation that she would be subject to." In response to counsel's question about the effect of separation from family members in Canada, Dr Waldman concluded that, in his opinion, at this point in her life, the applicant "would be unable to emotionally tolerate the isolation" and at minimum, "she would experience profound grief in the context of the loss of regular contact with her sons and their families and is at risk of developing

a depressive disorder". Dr Waldman also responded to the third question concerning whether long-distance communications would offset the negative issues.

[32] In my view, given the central importance of the impact of separation to the applicant's position on her application for H&C relief and the nature of Dr Waldman's conclusions about this applicant and this family, the officer was required to consider those conclusions with care. In addition, if the officer decided not to accept them (or to give them little weight), the officer had to explain why. The officer did not do either one. The officer focused on some comments made by Dr Waldman on the first issue of emotional impact on the applicant and her grandchildren (but not his conclusion) and did not refer to or engage with the critical second opinion on the impact of separation.

[33] Second, I am not confident that the officer assessed the BIOC against the correct legal standard and in light of the evidence from Dr Waldman and the applicant's submissions.

[34] In assessing applications on H&C grounds, an officer must always be alert, alive and sensitive to the best interests of the children. Those interests must be well identified and defined, and examined with a great deal of attention in light of all the evidence. See *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 35 and paras 38-40; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 at paras 5 and 10; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358 at paras 12-13 and 31; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 75; *Mebrahtom v Canada (Citizenship and*

Immigration), 2020 FC 821 (McHaffie J) at paras 7-8 and 14. The children's interests must be given substantial weight and be a significant factor in the H&C analysis, but are not necessarily determinative of an H&C application: *Kanthasamy*, at para 41; *Hawthorne*, at para 2.

[35] Children will rarely, if ever, be deserving of any hardship. While hardship may be considered, particularly if raised by an applicant, the concept of "undue hardship" is ill-suited when assessing hardship on innocent children: *Kanthasamy*, at paras 41 and 59; *Hawthorne*, at paras 4-6 and 9. See also *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 (Russell J.), at paras 64-67, as cited in *Kanthasamy* at para 59.

[36] I recognize the force of the respondent's submissions with respect to the officer's consideration of the inevitable or expected consequences of being required to leave Canada (as noted in *Kanthasamy*, at para 23). However, the reasons suggest that the officer improperly focused on whether the grandchildren would experience an undue degree of harm or hardship if separated from their grandmother, rather than identifying and considering what would be in their best interests as required by *Kanthasamy* and the cases cited above. The officer did not expressly identify the grandchildren's best interests, either generally or as individuals. As described at paragraph 14, above, the officer's discussion of the BIOC used language such as "jeopardize the best interests of the grandchildren", "insufficient evidence that these children are totally dependent upon the applicant", "insufficient evidence that these children were unable to function prior to the applicant's presence in Canada" and that there was "insufficient evidence that these children could not continue to function in her absence". In my view, the observations concerning whether the children were "totally dependent" on their grandmother, or could not "function"

without her, were not consistent with the legal constraints established in the BIOC case law. They suggest that the officer erroneously imposed a burden on the applicant to show that the children would suffer undue harm (or worse) if separated from her.

[37] The officer also did not refer to Dr Waldman's report and conclusions in relation to the BIOC and did not engage with the applicant's submissions on the BIOC. Dr Waldman prepared his report based in part on interviews with the applicant, his sons and their spouses, and the four school–aged grandchildren. He set out various factual matters in his report about the interdependent relationships amongst the applicant, her sons and their spouses, and the grandchildren, including what she does with the grandchildren. Dr Waldman also had the opportunity to watch the children interact with the applicant. Dr Waldman concluded that when he "was able to observe Mrs Narula interact with her grandchildren, it was clear that they have a very special relationship" and that she was an "essential" caregiver for her grandchildren. As noted already, Dr Waldman's opinion was that the "emotional impact of removing Mrs Narula from her grandchildren's life would be emotionally devastating for all of them". However, the officer did not mention Dr. Waldman's conclusions as they may affect the BIOC and did not meaningfully address the potential consequences of the applicant's removal on her grandchildren. See *Sahota v Canada (Citizenship and Immigration)*, 2020 FC 361 (Ahmed J.), at para 31.

[38] The respondent submitted that the record did not contain significant evidence on the specific interests of each of the grandchildren and how they might be affected by the applicant's separation from her immediate family in Canada. The respondent is correct that the officer's

reasons must be considered in light of the record: *Vavilov*, at paras 91-95. I also agree that an officer's ability to carry out the assessment in a responsive manner, as contemplated by *Kanthasamy*, is partially dependant on the quality and extent of the evidence filed to support the application. It is more difficult to engage meaningfully with a thin record. In this case, the applicant's submissions to the officer addressed the BIOC with reference to factors such as age, level of dependency, children's establishment in Canada and links to India. While these submissions were at a higher level of generality than one might hope, the officer did not refer to these factors - even to say that a proper BIOC analysis could not be carried out due to lack of evidence about the interests of each individual child. I observe that the officer's reasons did not list the grandchildren in describing the applicant's "Dependents and Other Family Members", or refer to their names, ages or even how many grandchildren would be affected by the applicant's potential return to India.

[39] The overall decision under IRPA subsection 25(1) involves an exercise of discretion, subject to the legal and factual constraints that bear on it. Considering all of the circumstances above, I am persuaded that the officer's decision must be set aside as unreasonable under the *Vavilov* standard.

[40] The application is therefore allowed. Neither party proposed a question for certification and none is stated.

JUDGMENT in IMM-191-21

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision of the senior immigration officer dated January 12, 2021 is set aside and the matter remitted for redetermination by another officer. The applicant shall be permitted to adduce new evidence and make additional submissions.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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