Federal Court  Cour fédérale

Date: 20220228

Docket: IMM-5836-20

Citation: 2022 FC 277

Toronto, Ontario, February 28, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

CHARLES PHILLIP GREGORY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Charles Gregory, filed an application for permanent residence from within Canada on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). A senior immigration officer refused his application by decision dated April 14, 2020.

[2] The applicant asks this Court to set aside the decision refusing his application on two grounds: that the officer failed to conduct the assessment of his H&C grounds through a compassionate lens, and because the officer ignored material evidence.

[3] In my view, the officer made reviewable errors by failing to apply the required standards set out by the Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 and this Court's decisions following it. Therefore, I conclude that the officer's decision must be set aside as unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[4] The application will therefore be allowed. Mr. Gregory's application will be remitted to another officer for redetermination.

I. Facts and Events Leading to this Application

[5] Mr. Gregory is a citizen of Antigua and Barbuda. He came to Canada in 2011 for a two-week visit. He made another visit in 2014. He returned in 2016 on a six-month visa, which was extended for another six months.

[6] In August 2017, just before he was scheduled to depart at the end of his third visit, the applicant suffered a serious heart attack. He spent five days in hospital.

[7] Shortly after the applicant's heart attack, a hurricane severely damaged his home (which he described as a "shack" in the "bush of Antigua").

[8] He has remained in Canada since that event, without legal status after the expiry of his visa. He is currently a patient of Regent Park Community Health Centre in Toronto, which provides health care to uninsured individuals without status. Regent Park CHC provides him with health-based services including prescribed medications for high blood pressure, assistance in getting other medication, and counselling support.

[9] The applicant's affidavit confirmed that, having no legal status in Canada, he has been unable to obtain a work permit and has therefore been forced to live in a shelter. He sometimes is able to get odd jobs or day labour but he cannot get a permanent job to support himself.

[10] To support his H&C application, Mr. Gregory filed his own affidavit, together with submissions from an immigration consultant and documentary evidence, including a letter from his sister in Canada, letters of support from community organizations (including the Salvation Army) where he has volunteered, confirmation of his casual work from a company for which Mr. Gregory has provided day labour, and letters from professionals at Regent Park CHC including his caseworker/counsellor and a nurse practitioner describing his health situation. The applicant also filed evidence about conditions in Antigua, including poverty levels and the impact of hurricanes in 2017.

[11] Mr. Gregory's application for H&C relief was based in part on his present circumstances in Canada and in part on his anticipated life if he returns to Antigua. His affidavit described his life in Antigua before coming to Canada and what he anticipates if he returns to Antigua.

[12] Before coming to Canada, Mr. Gregory had become estranged from the rest of his family in Antigua over "political differences" concerning which party to support in elections. As noted,

he lived in a shack in the bush. He "was suffering, alone, and hungry". He testified that if he returns to the islands, there is "nowhere for me to go for assistance in Antigua – there are no food banks and no welfare system". His children are in no position to support him. By contrast, Mr. Gregory testified that in Canada, "I am never hungry, have clothes, have shelter – I don't want to be illegal."

[13] The letter from Mr. Gregory's nurse practitioner confirmed that in August 2017, Mr. Gregory suffered an acute inferior myocardial infarction. He was treated emergently with the insertion of a stent in his coronary artery and admitted to the hospital for several days of monitoring. He started taking several drugs that are crucial to preventing another heart attack, including a therapy to prevent blood clots, anti-hypertensive medications to control blood pressure and reduce the workload of the heart, and intensive cholesterol-lowering treatment. The nurse practitioner's letter stated that without ongoing access to these medications, the applicant is at high risk of another heart attack. In addition, abnormalities with Mr. Gregory's thyroid gland were discovered, which require further diagnostic testing. The letter also confirmed that Mr. Gregory will need to continue to take medications to manage his blood pressure for the rest of his life and requires other ongoing treatment and care.

[14] If he had to return to Antigua, Mr. Gregory testified that, he "will not be able to get the medications that I require to stop another heart attack. I will suffer back home. I will be totally isolated and do not have support or any help. There is no option for work there and no welfare support. I often went hungry there and could only drink rainwater to fill my stomach."

[15] Mr. Gregory testified that he cannot receive proper medical care in Antigua because there are no real hospitals, very few doctors and very long wait lists. "It is hard to get medication, you

have to pay for medications and I have no money, there is a lot of poverty and the poor suffer a great deal. There is limited emergency services – little access to ambulance if you live far away from the city."

II. The Decision under Review

[16] The officer's 7-paragraph reasons began with the following statement: "[t]he purpose of an H&C application is not to simply be a fast track method of immigration, but for the Minister and delegate to consider exceptional circumstances that do not fall under the usual immigration paths."

[17] The decision discussed the following factors on the H&C application: establishment; best interests of the child ("BIOC"), namely the applicant's niece; the applicant's medical conditions; and some of the conditions in Antigua if the applicant returns there.

[18] With respect to establishment, the officer referred to Mr. Gregory's three visits to Canada and that since the expiry of his extended six-month visa, he has not had status in Canada. The officer noted that Mr. Gregory had some family and friends in Canada but had not been living in Canada for a significant period of time. The officer noted that Mr. Gregory had held inconsistent work while in Canada and had not been able to keep constant housing. While "sympathetic to the fact he has made friends in Canada, and he has family in Canada", the officer was "unconvinced he would unable to put down similar roots in Antigua and Barbuda and after a year of probation he would be eligible to apply for a visitor visa again." The officer accepted that the applicant had some establishment in Canada, but relatively little for the amount of time he has spent in the country. The officer gave it little weight.

[19] I pause to note that the officer also did not mention that Mr. Gregory lives in a shelter in Canada. The officer also did not mention that, despite his health concerns, the applicant has spent considerable time volunteering with several organizations while in Canada and did not refer to the letters from those organizations in the record.

[20] With respect to the BIOC, the officer found there was little evidence about the nature of the applicant's relationship with his niece. The officer gave it little weight. This part of the officer's decision was not challenged on the application.

[21] With respect to the applicant's medical conditions, the officer recognized that Mr. Gregory had experienced a heart attack and hypertension. The officer first noted that the applicant stated that due to his health issues, he was unable to work "but provides no evidence of this". I pause again to note that in fact, the applicant testified that he could not find constant work to support himself because he did not have a work permit, not that he could not work due to his health. In addition, Mr. Gregory did have some casual work and provided a letter to corroborate that work.

[22] The officer recognized that Mr. Gregory's "medical situation is less than perfect". The officer found that while Canada has a more robust healthcare system than Antigua and Barbuda, that did "not mean Antigua and Barbuda would be incapable of helping the applicant's healthcare problems". The officer found that Antigua has adequate healthcare and that the healthcare capacity of Antigua "has been increasing, and the government has been moving towards more comprehensive care". The officer noted the nurse practitioner's letter stating that he would not have adequate care in Antigua, "but the letter did not state where this information came from, which is not sufficient to establish this fact". Again I pause to note that it was clear

from the nurse practitioner's letter that the source of the information about Antigua's healthcare system came from the applicant himself, based on his experience living there. The officer gave the applicant's health "little weight" in the H&C assessment.

[23] Turning to the applicant's situation if he were to return to Antigua, the officer stated that Mr. Gregory stated that his home in Antigua was damaged by a hurricane, but has "not provided any evidence to show this fact". The officer did not mention Mr. Gregory's sworn evidence that he lived in a shack in the bush in Antigua. The reasons appeared to accept that a hurricane had gone through Antigua and Barbuda in 2017 but did not refer to the impact of two hurricanes as described in the applicant's country condition evidence. That evidence confirmed that Hurricane Irma devastated Antigua and Barbuda in 2017 and that nearly all of Antigua's infrastructure had been damaged by the storms ("…hundreds of Antiguans died or were displaced. 95 percent of the islands' infrastructure has been destroyed, with an estimated $100 million required to rebuild the country").

[24] The officer noted the applicant's position that he would have inconsistent work in Antigua and Barbuda if he were to return. Then:

> [The applicant] states he would not be able to find work, and while I recognize the economic situation in Canada is not as healthy as in Canada, Antigua and Barbuda is one of the richest and most developed of the Caribbean nations. Additionally, the applicant was able to previously live and work while in Antigua and Barbuda.

[25] The officer concluded by recognizing that the applicant's situation was better in Canada than if he were to return to Antigua and Barbuda, but "[s]imply having a better life in Canada is

insufficient for an exemption." Looking at all the evidence, the officer found "little weight to grant an exemption" and dismissed the application.

[26] The applicant raised two bases to challenge the reasonableness of the decision. First, the applicant argued that the officer failed to apply the required legal test set out in *Kanthasamy*, because the officer failed to assess the application "through a compassionate lens". The applicant argued that the officer instead applied an exceptionality test to the applicant's circumstances. Second, the applicant submitted that the officer ignored material evidence with respect to the level of available medical care, poverty and other conditions in Antigua. The applicant contended that the officer erroneously found that Antigua's living conditions allowed him to live there. He challenged the officer's observations about the health care system in Antigua and the officer's statement that Antigua and Barbuda is "one of the richest and most developed of the Caribbean nations".

[27] The respondent submitted that the officer's decision was reasonable, emphasizing that relief under *IRPA* section 25 is exceptional and discretionary. The respondent maintained that the officer's findings were open to the officer on the "thin" record filed by the applicant to support his H&C application. The respondent maintained that the applicant was attempting to re-argue the original application and asking the Court to reweigh the evidence, which is not permitted on a judicial review application.

III. Legal Principles

A. *H&C Applications*

[28] 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. Humanitarian and compassionate considerations refer to "those 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' from the effect of the provisions of the [*IRPA*]": *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, at p. 350, as quoted in *Kanthasamy,* at paras 13 and 21.

[29] The purpose of the H&C provision is to provide equitable relief in those circumstances: *Kanthasamy*, at paras 21-22, 30-33 and 45. The H&C discretion is a flexible and responsive exception to the ordinary operation of the *IRPA*, to mitigate the rigidity of the law in an appropriate case.

[30] Subsection 25(1) has been interpreted to require that the officer assess the hardship that the applicant(s) will experience on leaving Canada. Appellate case law has confirmed that the words "unusual", "undeserved" and "disproportionate", as used in H&C guidelines, describe the hardship contemplated by the provision that will give rise to an exemption. Those words to describe hardship are instructive but not determinative, allowing subsection 25(1) to respond flexibly to the equitable goals of the provision: *Kanthasamy*, at paras 33 and 45.

[31] The H&C assessment under subsection 25(1) is a global one, and relevant considerations are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances: *Kanthasamy*, at paras 27-28. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Kanthasamy*, at paras 25 and 33; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 74-75.

B. ***Standard of Review of the Officer's Decision***

[32] The standard of review of the officer's decision is reasonableness: *Kanthasamy*, at para 44. The reasonableness standard was described in *Vavilov*. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[33] 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 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.

[34] 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; *Entertainment Software*

Association v Society of Composers, Authors and Music Publishers of Canada, 2020 FCA 100, at paras 24-35.

IV. Analysis

[35] The central issue in the present case is whether the officer's decision was justified in relation to the legal constraints imposed by the Supreme Court's decision in *Kanthasamy* and the factual constraints in the record. In my view, the officer's reasons, read in the context of the evidence, did not follow the requirements set out in *Kanthasamy* for H&C relief. The decision contained reviewable errors and must be set aside.

[36] I agree with the applicant that the officer erred in law by conducting a segmented approach to the H&C assessment and by failing to apply the *Chirwa* standard endorsed by the Supreme Court to all the evidence: *Kanthasamy*, at paras 13, 21 and 45; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1482, at paras 16-19; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72, at para 33. Other than a mention of being "sympathetic" to the fact that the applicant has friends and family in Canada, the officer's reasons do not indicate that the assessment considered or implemented the equitable purpose of section 25: *Kanthasamy*, at para 45; *Salde v Canada (Minister of Citizenship and Immigration)*, 2019 FC 386, at paras 22-25.

[37] The officer did not expressly mention the need to assess the effect of removal on an H&C application, or to assess any hardship that the applicant may face if he returns to live in Antigua: *Kanthasamy*, at paras 32-33, 45 and 48. Apart from a brief reference to finding work, the officer did not assess the conditions this particular applicant would face in resettlement in Antigua

warranted relief: *Zhang*, at paras 14, 19, 24 and 25. That is clear because, reviewing the officer's reasons together with the record, the officer did not mention material evidence related to how the applicant had lived in Antigua and how he expected to live in Antigua if he returns there. The officer did not recognize the applicant's evidence that he would return to a country in which he had no home and no family or other support system (as he had in Canada), and would arrive in Antigua with a life-threatening condition that had substantially worsened since he left, now requiring him to take medicines that he cannot afford. Put another way, the officer's reasons did not account for the reality of Mr. Gregory's life: see *Klein v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1004, at para 7. Instead of addressing the applicant's testimony about his circumstances and the country condition evidence he filed, the officer diminished the applicant's evidence by characterizing his application as simply wanting a better life in Canada.

[38] I have already referred to several other errors or omissions of fact in the officer's reasons that overlooked evidence in the record that ran against the officer's findings: *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, *per* Gleason JA (LeBlanc JA concurring), at para 123, and quoting *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), [1999] 1 FC 53, at paragraphs 14-17.

[39] The applicant also challenged the officer's statement that Antigua and Barbuda is "one of the richest and most developed of the Caribbean nations". There appear to be two statements in the country condition evidence that could support the officer's statement. The respondent pointed to one article that referred to the country as "a popular hub for tourism, making it one of the most economically successful nations in the Caribbean". However, the article is entitled "Why is

Antigua and Barbuda Poor?" and that is its true subject. A second article – with the same title – mentioned that the two political parties in the country had different views on the level of poverty amongst its people. The more favourable view "would make Antigua and Barbuda one of the least poor countries in the Caribbean." If the officer based the statement on these sources, it displayed a selective way to read evidence that skewed the predominant contents of the articles. In addition, there was other evidence filed by the applicant concerning the high unemployment rate and high poverty rate in Antigua and its inability to recover fully from the effects of the global economic recession in the late 2000s.

[40] Considering the limited and selective scope of the evidence mentioned in the officer's reasons alongside the overlooked or discounted evidence that favoured granting H&C relief to the applicant, I am unable to conclude that the officer applied the *Chirwa* standard or that the officer took into account all the evidence in the record, as *Kanthasamy* and *Baker* required. The officer's decision did not respect the factual and legal constraints bearing on it and failed to take into account relevant and material evidence: see *Vavilov*, at paras 101, 105-106 and 126; *Federal Courts Act*, RSC 1985, c F-7, paragraph 18.1(4)(*d*).

[41] In view of these conclusions, it is not necessary to consider the applicant's submission that the officer made a reviewable error by applying an exceptionality test.

[42] Finally, although the officer's decision contained reviewable errors, these Reasons do not conclude that there was necessarily only one possible outcome to the applicant's request for permanent residence with relief on H&C grounds. I do conclude, however, that all of the salient

evidence in the record must be considered and assessed according to the binding legal standards. The officer's decision did not do so.

V. Conclusion

[43] The application is therefore allowed. The officer's decision is set aside and the matter will be remitted to another officer for a redetermination. The applicant shall have the right to update or file additional evidence and/or submissions in relation to the redetermination of his H&C application.

JUDGMENT in IMM-5836-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision of the senior immigration officer dated April 14, 2020 is set aside and the matter remitted for redetermination by another officer in accordance with the Reasons in this proceeding. The applicant shall be permitted to submit additional evidence or argument for the redetermination.
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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APPEARANCES:

Jean Marie Vecina	FOR THE APPLICANT
Nur Muhammed-Ally	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jean Marie Vecina Vecina Law Professional Corporation Toronto, Ontario	FOR THE APPLICANT
Nur Muhammed-Ally Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT