Federal Court  Cour fédérale

Date: 20210415

Docket: IMM-5796-19

Citation: 2021 FC 326

Toronto, Ontario, April 15, 2021

PRESENT: Mr. Justice Andrew D. Little

BETWEEN:

XHEVDET SHALA
AJSHE SHALA
ARBRESHA SHALA
JETON SHALA
ARJANITA SHALA
ERJON SHALA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review, the applicant family challenges a decision by an immigration officer denying their application for temporary resident permits under subs. 24(1) of the *Immigration and Refugee Protection Act*, SO 2001, c 27 (the "*IRPA*"). They submit that the

decision should be set aside as unreasonable under the principles set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[2] After careful consideration of the arguments advanced by the applicants, I have concluded that the officer's decision does not contain a reviewable error on the main issue on whether the family have been the victims of human trafficking. However, I have also concluded that the officer did not consider the family's alternative request for temporary resident permits on grounds other than human trafficking, to regularize their legal status pending a decision on their second application for humanitarian and compassionate ("H&C") relief under subs. 25(1) of the *IRPA*. The Court therefore will allow the application in part, so that a different officer may consider their application for temporary resident permits on the alternative grounds.

I. Facts and Events Leading to this Application

[3] The applicants are Xhevdet Shala, Ajshe Shala and their four children. They are all citizens of Kosovo.

[4] The Shala family applied for temporary resident permits ("TRPs") under *IRPA* s. 24 based on allegations of human trafficking. The applicants claimed that Mr Shala was duped into coming to Canada by their neighbour in Kosovo, Bashkim Azemaj, and was exploited in his workplace once he arrived here.

[5] According to the applicants, Mr Shala first thought of coming to Canada in 2009 owing to a conversation with Bashkim Azemaj about working for a company in Canada operated by

Selman Azemaj, Bashkim's brother. Eventually, Bashkim Azemaj offered that if the family paid a fee of €30,000, the brothers would arrange work for Mr Shala in Selman Azemaj's company and entry into Canada for the entire family.

[6] On this application, the applicants alleged that Bashkim Azemaj made three promises that deceived Mr Shala: that he would have an open work permit in Canada; that he would be able to repay his €30,000 recruitment fee within a year; and that the family would have a furnished apartment on arrival and the Shala children would be registered in schools and taken to school each day.

[7] Mr Shala took out two loans from individual moneylenders in Kosovo in order to pay the recruitment fee. He arrived in Canada owing €30,000 to the moneylenders and an additional €10,000 to the Azemaj brothers.

[8] The family entered Canada on September 17, 2013. Their new life was far from their expectations. They arrived to find a smelly apartment filled with garbage, mouldy furniture and no beds. The children were not registered in school. Mr Shala soon learned that he held a closed work permit that allowed him to work only for a company owned by Selman Azemaj. And Mr Shala's rate of pay, which was often subject to unlawful deductions by Selman, precluded short-term repayment of the debts he owed.

[9] Mr Shala started work immediately. He claimed that Selman demanded very long work hours, six or seven days a week, without standardized breaks, under bad conditions, and abused

him verbally. Mr Shala was paid irregularly and for many fewer hours than he actually worked. The employer made improper deductions from his pay. The union eventually intervened. It fined Selman's company over $47,000 for breaching the collective agreement by failing to pay amounts owing for hours worked by its employees. When Mr Shala complained about his pay or working conditions, Selman would threaten to fire him and warn that he would be deported back to Kosovo, where he made far too little money to ever repay the debts he had incurred. Mr Shala claims that Selman's company then tried to reduce the wages paid to him and asked him to pay $7,000 to cover "union dues", or be fired. Mr Shala refused to pay the $7,000 and his employment was terminated in October 2015.

[10] Mr Shala's work permit expired in January 2016. The family therefore lost their legal status in Canada. They subsequently made unsuccessful refugee claims (which were dismissed on appeal by the Refugee Appeal Division). They applied for permanent residence based on humanitarian and compassionate grounds, which was denied. They applied for a pre-removal risk assessment, which was also returned in the negative.

[11] During this time, Mr Shala also applied for an open work permit, which was approved as a non-status open work permit on April 18, 2018.

[12] After retaining new counsel, the applicants applied for TRPs based on a claim that they were victims of trafficking in persons (known sometimes as a "TRP-VTIP") perpetrated by the two Azemaj brothers. Following an interview, the family's initial VTIP application was unsuccessful.

[13] On October 9, 2018, Justice Boswell ordered the stay of the Applicants' removal from Canada until the final determination of their then-pending application for judicial review: 2018 CanLII 95596 (FC).

[14] Also in October 2018, the applicants submitted a second H&C application. To my knowledge, that H&C application is pending.

[15] On April 5, 2019, this Court set aside the first TRP-VTIP decision: 2019 FC 416 (Strickland J).

[16] The family participated in a second VTIP interview on July 19, 2019. They provided further evidence and submissions to the officer after the second interview. They submitted that TRPs should be issued as they were victims of human trafficking and, in the alternative, that TRPs should be granted until their H&C application is decided.

[17] In a decision dated September 12, 2019, the officer dismissed their application with reasons. That decision is challenged on this application for judicial review.

[18] On April 12, 2019, the applicants applied for a second open work permit, which was refused on July 19, 2019. The applicants therefore currently have no legal status in Canada.

II. Legal Principles

Temporary Resident Permits

[19] A TRP may be issued under s. 24 of the *IRPA*. Subsections 24(1) and (3) are particularly pertinent:

> **24 (1)** A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.
>
> **[…]**
>
> **(3)** In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.

[20] A TRP is considered "exceptional" and may be issued for a finite period of time, subject to renewal: *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262, at paras 8 and 48; *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 784 (Phelan J.) at para 9. The burden on an applicant is heavy: *El Rahy v Canada (Citizenship and Immigration)*, 2020 FC 372 (Pamel J.), at para 59.

[21] The purpose of the TRP under s. 24 has been described as to "soften the sometimes harsh consequences of the strict application" of the *IRPA* if a foreign national is inadmissible or has not complied with the *IRPA: Farhat v Canada (Citizenship and Immigration)*, 2006 FC 1275 (Shore J.) at para 22, recently quoted by Justice McHaffie in *Shabdeen v. Canada (Citizenship and Immigration)*, 2020 FC 492, at para 33 and by Justice Pamel in *El Rahy*, at para 57. In the latter

decision, Justice Pamel also noted that the "very purpose of a TRP is to allow individuals to who have not respected the IRPA to regularize their status" (at para 62).

[22] Given the language used in subs. 24(1) ("… if an officer is of the opinion that it is justified in the circumstances …"), this Court has held that a TRP decision is discretionary: *Ali*, at para 9; *César Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 880 (Bédard J.), at para 93; *Lorenzo v Canada (Citizenship and Immigration)*, 2016 FC 37 (Shore J.), at paras 22-23; *Bhamra v Canada (Citizenship and Immigration)*, 2020 FC 482 (McDonald J.), at para 27. As Justice McHaffie has noted in *Shabdeen*, there is some divergence in the cases decided by this Court concerning the standard to be applied in a TRP application under subs. 24(1): see *Shabdeen*, at para 14. Like Justice McHaffie, I do not need to address the divergence in these reasons.

[23] In the present case, the Minister has issued instructions, which, owing to *IRPA* subs. 24(3), constrain the exercise of the officer's discretion to issue a TRP under subs. 24(1).

Standard of Review

[24] Both parties submitted that the standard of review of an officer's decision under subs. 24(1) is reasonableness, as described in *Vavilov*. I agree.

[25] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a

whole is transparent, intelligible and justified: *Vavilov*, at para 15. The focus of reasonableness review is on the decision actually made by the decision maker, including both the reasoning process (i.e. the rationale for the decision) and the outcome: *Vavilov*, at paras 83 and 86; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6, at para 12. 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*, at para 85.

[26] The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

III. Analysis

[27] I will address the issues raised by the applicants in turn.

The Applicants' Request for TRPs based on Human Trafficking

[28] The main application before the officer was for TRPs based on human trafficking. In 2007, the Minister of Citizenship and Immigration issued instructions in relation to such TRP applications entitled the "Ministerial Instructions regarding the issuance of Temporary Resident Permits to victims of human trafficking" (the "Ministerial Instructions"). The stated objective of the Ministerial Instructions is to provide protection to vulnerable foreign nationals who are victims of human trafficking by regularizing their status in Canada when appropriate. The Ministerial Instructions provide guidance on issuing a TRP on both a short-term basis (up to 180 days) and on a long-term basis, including criteria for the issuance of each. The purposes of the short-term TRP include to "provide a period of reflection for victims of trafficking in persons to

further consider their options for returning home or to allow time to decide if they wish to assist in the investigation of the trafficker or in criminal proceedings against the trafficker"; to allow victims to recover from physical and/or mental trauma; to allow victims to escape the influence of traffickers so they can make an informed decision on future course of action; and to protect vulnerable foreign nationals who are victims. A longer-term temporary resident permit may be granted in cases where a more complete verification of the facts provides reasonable grounds for the officer to believe that the individual is a victim of trafficking in persons. The Ministerial Instructions provide that the officer should consider certain factors in reaching a decision on a longer-term TRP.

[29] The Ministerial Instructions set out the following definition of human trafficking, from Article 3 of the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2003) (the "UN Trafficking Protocol"):

> Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

[30] The Ministerial Instructions note that the UN definition has three "key elements", namely act, means and purpose:

1. a physical act: for example, recruitment, transportation or harbouring of a person;

2. accomplished through means: for example, threats, force, coercion or deception;
3. for a specified purpose: exploitation of victims.

[31] I now turn to the officer's reasons.

[32] The officer set out the definition of human trafficking from the UN Trafficking Protocol and a shorter definition from the UN's International Labour Office ("All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily": International Labour Office, *Human Trafficking and Forced Labour Exploitation Guidelines: for Legislation and Law Enforcement* (2005) at p. 17 (the "ILO Convention")).

[33] The officer decided that, in the absence of evidence of other factors related to the UN definition, he would examine the concept of employing deception and fraud to induce Mr Shala into forced labour. The officer stated: "taken together, the evaluation of all prevailing factors will be used to cumulatively assess whether the applicants meet the definition of victims of labour trafficking per ministerial instructions or the UN's international doctrines."

[34] After a detailed discussion of the facts, the officer stated he would focus on whether Mr Shala satisfied the definition of a "victim of labour trafficking" under the UN Trafficking Protocol or the Ministerial Instructions and "whether a corresponding long-term TRP, given

outside of preliminary assessments, shall be issued to [Mr Shala] and accompanying dependents as a result."

[35] The officer then discussed the nature of labour trafficking, which he distinguished from labour exploitation. The officer considered that labour trafficking occurs when an employer compels or deceives a worker into providing involuntary labour, often using violence, threats, manipulation of debt, blackmail or fraud to force victims to work. By contrast, the officer described labour exploitation as occurring when employers profit from the illegal treatment of their workers but do not exert the level of control that characterizes labour trafficking. Labour trafficking victims frequently experience multiple forms of labour exploitation. The officer further distinguished between persons who are "under some form of economic compulsion to accept sub-standard working conditions because they simply have no alternative (exploitation or abuse of vulnerability, but not necessarily forced labour) and those against whom actual coercion is exercised by a third party to force them to undertake a job against their will".

[36] The officer adopted an "action, means, purpose" approach to assess the circumstances of the case. The officer found that Mr Shala "intended to pursue employment opportunities in Canada with the prospect of a better financial future" and was aware that he might be temporarily required to work in a different field or industry. The officer concluded that the applicant "agreed to terms" and chose to proceed to Canada, bringing with him his family as accompanying dependents, "none of whom were subjected to labour". The officer found that Mr Shala's evidence about his hours, irregular payments and unlawful deductions were indicative of labour exploitation, not trafficking, due to the absence of force or compelled labour.

[37] The officer also considered the issue of debt bondage. The officer concluded, based on the evidence, that Mr Shala "accepted the work conditions out of economic necessity to pay rent and support his family and did not mention any systemic deductions taken for repayment of the debt owed" to the Azemaj brothers. Mr Shala did not report his situation to police. The officer also noted that when Mr Shala refused attempts to recoup union settlement fees from him, he was told his employment was terminated.

[38] Lastly, the officer considered the submission that the Shala family feared returning to Kosovo due to loan shark intimidation arising from the remaining funds owed. The officer noted that the funds were not obtained illegally or unlawfully, nor had the applicants suggested or provided proof of inadequate state protection in Kosovo should they be targeted by loan sharks.

[39] Overall, "assessing all prevailing factors", the officer concluded that the components of the UN Trafficking Protocol and the ILO Convention were not satisfied, "especially considering [Mr Shala] was not deceived into providing involuntary labour or forced to work against his will." The officer found that Mr Shala did not meet the definition of a victim of human trafficking under the Ministerial Instructions or the UN Trafficking Protocol. Therefore, the officer did not find compelling reasons or circumstances existed to warrant the issuance of a TRP under subs. 24(1) of the *IRPA*.

[40] On this application, the applicants made two principal arguments to challenge the officer's decision not to issue TRPs on the basis of human trafficking: (a) the officer unreasonably concluded that Mr Shala was not fraudulently recruited; and (b) the officer

unreasonably concluded that Mr Shala was not controlled by Selman Azemaj. Both concern the application of legal principles to the evidence.

[41] First, on fraudulent recruitment, the applicants challenge the officer's conclusions that Mr Shala was not deceived into providing involuntary labour and that he "agreed to terms" of employment. They contend that the officer ignored uncontradicted evidence that Mr Shala was deceived into providing labour because none of the three promises made by Bashkim Azemaj was true: Mr Shala did not receive an open work permit; the pay and other labour conditions made it impossible to repay the €30,000 recruitment fee within a year; and the family was not provided with a furnished apartment on arrival nor were the Shala children registered in or taken to school. The applicants submitted that Mr Shala did not agree to work "terms" that included the minimal pay, long hours and other terrible conditions he experienced. They also submitted that the chronic deductions in pay subjected Mr Shala to a form of debt bondage.

[42] The respondent characterized the applicants' submissions as asking the Court to reweigh the evidence or make its own decision about the merits of the TRP application, neither of which is permitted under judicial review principles: *Vavilov*, esp. at paras 125-126. I agree with the respondent that the applicants' submissions did stray into that arena. I will only consider the arguments as permitted by *Vavilov*, which concern the officer's reasoning process and whether the decision respected the factual and legal constraints that affected it.

[43] At paragraph 101 of *Vavilov*, the Supreme Court identified two types of fundamental flaws that may lead a reviewing court to set aside an administrative decision. One arises when a

decision is in some respect "untenable in light of the relevant factual and legal constraints that bear on it". The Court's reasons specifically addressed a number of constraints, including the evidence before the decision maker (at paras 125-126). A reasonable decision is "justified in light of the facts" but absent "exceptional circumstances", a reviewing court will not interfere with the decision maker's factual findings and will not reweigh or reassess the evidence (at para 125). The decision maker must take into account the evidentiary record and the general factual matrix that bear on its decision and its decision must be reasonable in light of that record and the factual matrix. As the Supreme Court held, a decision "may be jeopardized" if the decision maker "fundamentally misapprehended or failed to account for the evidence before it" (at para 126). The evidentiary record and the factual matrix therefore act as constraints on the reasonableness of a decision: see also *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 (Rowe J), at para 61; *Canada (Attorney General) v Honey Fashions Ltd.*, 2020 FCA 64 (de Montigny JA), at para 30.

[44] Not every mistake or misunderstanding of the evidence will warrant intervention by a reviewing court because not every aspect of the factual and legal circumstances operates as a constraint on the administrative decision maker: *Vavilov*, at para 105. The Supreme Court was clear in *Vavilov* that the reviewing court's ability to intervene arises if the decision is "untenable in light of the relevant factual … constraints" or if the decision maker "fundamentally misapprehended or failed to account for the evidence before it" [emphasis added]. Even then, the Court stated that the decision "*may* be jeopardized" [my italics] if the decision maker fundamentally misapprehended or failed to account for the evidence before it – it is not mandatory to set aside the decision. See also paragraphs 101 and 194 (the decision may set aside

if the reviewing court "lose[s] confidence" in the decision). This approach is consistent with paragraph 18.1(4)(*d*) of the *Federal Courts Act*, RSC 1985, c F-7.

[45] In my view, the applicants have not identified a reviewable error in the officer's decision on this issue. The officer's role was to identify the correct law to apply, review the evidence and determine the facts, and apply the law to those facts in reaching a decision under *IRPA* subs. 24(1). It is the Court's role to ensure that the officer respected the law, used a reasoning process that was transparent and intelligible, delivered a decision that was justified by way of reasons, and arrived at a reasonable outcome.

[46] The officer identified the proper overall issue – employing deception and fraud to induce forced labour. The officer understood that the applicants requested a long-term TRP, not a short-term TRP. The officer was aware of and considered the facts related to the three promises relied upon by the applicants, and Mr Shala's negative work experiences after arriving in Canada. The officer described and distinguished between labour exploitation and labour trafficking, which the applicants did not challenge in this proceeding. The officer applied the act, means, purpose approach to the UN's definition of human trafficking, as described in the Ministerial Instructions, and noted that each of the three elements must be present to support a conclusion of human trafficking. Assessing the evidence with those legal principles, the officer characterized the factual circumstances here as labour exploitation, rather than human trafficking.

[47] Despite the vigorous arguments made by the applicants' counsel, I am unable to conclude that the officer's assessment was "untenable" or that the officer "fundamentally

misapprehended" the evidence as required by *Vavilov*. The officer's reasons display an appreciation of the relevant facts and the specific allegations made by Mr Shala about how he was recruited and the working conditions he experienced. The officer did not ignore the evidence, nor fail to give any effect to it. The officer instead concluded that the evidence supported a conclusion of exploitation of Mr Shala's labour, but did not meet the requirements of trafficking. In my view, there is no basis to interfere with the officer's decision given this Court's role on judicial review.

[48] In their submissions on the second issue raised (control by Selman Azemaj), the applicants focused on debt bondage. The officer addressed debt bondage in the reasons. The officer stated that Mr Shala had not worked for Selman Azemaj for four years. In those years, Azemaj did not pursue, intimidate or force Mr Shala into labour for repayment. The officer also found that Mr Shala never alerted police to his situation. When Selman Azemaj attempted to force Mr Shala to pay alleged union dues, Mr Shala refused and left his employment. The officer overall found that Mr Shala accepted the work conditions out of economic necessity to support his family.

[49] The applicants submitted that, as described by the UN, people enter the status or condition of debt bondage when "their labour, or the labour of a third party under their control, is demanded as a repayment of a loan or of money given in advance, and the value of their labour is not applied towards the liquidation of the debt or the length of the service is not limited and or the nature of the service is not defined" (UN Human Rights Council, "Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences" (4 July

2016), A/HRC/33/46). The applicants noted that debt bondage is made more powerful by wealth and currency disparities between the countries involved, in this case Kosovo and Canada. The applicants emphasized that Mr Shala was lured into taking on debt that he could not possibly pay off without working in Canada, and then forced to work for little pay and in terrible conditions in an attempt to pay that debt. The applicants submitted that the officer ignored evidence of coercion and control *during* the employment relationship, and wrongly focused on whether there were attempts at coercion *after* the employment relationship ended. In particular, they submitted that the "defining feature of this particular employment relationship [was] the ruthless extraction of overtime hours" from Mr Shala while he worked for Selman Azemaj's company. They noted that Selman Azemaj used the debt owed as a lever to ensure continued hard work, while simultaneously making large deductions from his pay to ensure the debt could never be repaid. While the officer found that Mr Shala did not alert police, the applicants submitted that doing so could have jeopardized the Shala family's immigration status in Canada – Selman Azemaj held up deportation as a sword of Damocles in order to subjugate Mr Shala.

[50] The respondent's position was that the Court cannot reweigh the evidence on the merits and that the officer assessed all the evidence in reaching his/ her conclusions. The respondent contended that the officer's reasons demonstrated a logical, transparent and justifiable chain of reasoning: Mr Shala was free to leave employment, so it was reasonable for the officer to conclude that he was not forced to work to repay the debt.

[51] In my view, the officer's decision was not unreasonable on this issue. As I read the reasons, the officer concluded that the employment relationship was not debt bondage, because

Mr Shala did not alert police, was able to leave employment, was not pursued by Selman Azemaj afterwards and was not forced back into compelled labour. By this stage of the reasons, the officer had already considered the evidence of Mr Shala's working conditions during employment at length. The brevity of the officer's analysis of debt bondage, and evidentiary references only to Mr Shala not alerting police at any time and to events after he left Selman Azemaj's company, make more sense against that background. I am unable to conclude that the evidence identified by the applicants constrained the officer to a conclusion other than the one reached, or that the officer's reasons are untenable under *Vavilov* principles.

[52] For these reasons, I conclude that the applicants have not demonstrated that the officer's reasons contain a reviewable error on whether TRPs should be issued under *IRPA* s. 24(1) on the basis of human trafficking. In my view, the officer's decision displays the necessary transparency, intelligibility and justification under the principles set out by the Supreme Court in in *Vavilov* and *Canada Post*.

The Applicant's Alternative Request for TRPs to Regularize their Status in Canada

[53] The applicants also submitted that they made an alternative request to the officer that if they were not eligible for TRPs on the basis of human trafficking, the officer should issue TRPs to the family on other grounds, pending the outcome of their second H&C application.

[54] The family's written submissions to the officer stated that they had submitted a second H&C application in October 2018, on the basis of having become established in Canada since September 2013. They explained that the issuance of TRPs would regularize the family's status

while they are waiting for a determination of that H&C application. They submitted that forcing them to uproot themselves while the H&C application is processed would cause unnecessary damage to a family who have already suffered much.

[55] The submission to the officer emphasized the best interests of the Shala children, including the impact of interrupting their school and employment and the impact on the mental health of (then) 17-year-old Arjanita. The submission set out the conclusion of this Court on the stay application, as follows:

> There is convincing non-speculative evidence that the applicants, notably the younger children, would suffer irreparable harm, in that the evidence adduced by the applicants upon this motion shows a serious likelihood of jeopardy to the life, security, or safety of the applicants if they were removed from Canada at this time.

[56] The submissions to the officer stated that Arjanita "has been depressed and suicidal as a result of the prospect of removal" back to Kosovo and referred to corroborating statements from a school official. The applicants provided an assessment report dated June 16, 2019 prepared by a psychologist, Dr Rod Day. This letter is 10 single-spaced pages. It is factually detailed and appears to be comprehensive. In Dr Day's view, Arjanita met the diagnostic criteria for a Major Depressive Disorder, Single Episode, Severe, which began when she realized the family might be facing removal from Canada. According to the report, her psychological state was:

> … steadily deteriorating. She is experiencing increased levels of depression, anxiety and dread as the prospect of deportation becomes steadily more imminent. Her functioning has already deteriorated to the point that she [is] regularly missing school, sequestering herself in her bedroom sobbing for much of the day, and is increasingly disengaged from her family.

[57] The psychologist concluded that in her current circumstances, he was "deeply concerned" about her risk for self-harming behaviours. Dr Day also concluded that if her father were deported to Kosovo, "there is no doubt that this would place [her] *in extremis* and precipitate even further deterioration in her psychological functioning and a commensurate increase in her already considerable risk of self-harm".

[58] In its summary, Dr Day's report stated that the results of his assessment indicated that Arjanita "currently exhibits severe depression and suicidality that first emerged in April 2017" and that it was difficult to envision any outcome that would not lead to a "further unraveling of her already precarious psychological state" to the point that she "will become at high risk for self-harm and may require inpatient hospitalization to stabilize her".

[59] The officer's decision mentioned Dr Day's report, but not its contents. The officer stated that while he "acknowledge[d] Arjanita's despondency at the thought of returning to Kosovo, [he found] the children will likely adapt with the support of their siblings and parents …" The officer also commented that the "overall distress of the family's involuntary relocation" was not a factor that "substantiate[d] whether … Mr Shala is or was a victim of labour trafficking".

[60] In my opinion, the applicants' request for TRPs on grounds other than human trafficking should be remitted back to another officer for a decision. There are several related reasons.

[61] First, the officer did not in fact consider the applicants' alternative request that TRPs be issued on a temporary basis for reasons *other than* their allegation of human trafficking, which

could regularize their status in Canada pending the outcome of the H&C application. This alternative request had to be addressed, as a matter of substance and of simple procedural fairness. Reading the entirety of the officer's reasons for decision, I am unable to find a substantive analysis of the merits of the alternative request or of the non-VTIP factors relied upon to support it. The officer's overall analysis, and in particular his final paragraph, only refer to findings and conclusion on the family's submission related to human trafficking.

[62] The alternative position of the applicants asking expressly for TRPs under subs. 24(1) was important and central to their overall submission. The request and the grounds that supported it could not be ignored: *Vavilov*, at para 128.

[63] In support of their position in this Court, the applicants also submitted that the existence and interests of children are a relevant circumstance that an officer must consider under subs. 24(1). The decided cases of this Court support the applicants' position: see *Ali*, at paras 12-13; *Palmero v Canada (Citizenship and Immigration)*, 2016 FC 1128 (Harrington J.), at paras 15 and 20; *Mousa v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1358 (Strickland J.) at paras 14–17; *César Nguesso*, at para 105. See also *Shabdeen* at paragraph 16, in which Justice McHaffie recently confirmed that an officer must consider a child's best interests when they form part of the circumstances relevant to a TRP application. The officer did not do so in the reasons.

[64] The officer's reasons did mention the evidence adduced in relation to Arjanita's mental health but did not demonstrate any engagement with that evidence. The officer's reasons referred

to Arjanita's "despondency", which suggested that she was merely in low spirits, dejected or sad. That statement is at odds with the professional opinion in Dr Day's report dated June 16, 2019, which identified a much more serious situation, and one that had first emerged in April 2017, more than two years before Dr Day's assessment in June 2019. While an officer is entitled to form his own reasoned conclusions based on the evidence and deviate from a professional opinion in the evidence, this Court has held that the officer is required to provide an explanation for doing so: *Jesuthasan v Canada (Citizenship and Immigration)*, 2018 FC 142 (Crampton CJ) at para 48; *Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212 (Gascon J.) at para 24. The officer's reasons did not attempt to provide such an explanation.

[65] The respondent argued that the officer was entitled not to decide the alternative request for TRPs because the family had not paid a separate $200 fee for its consideration. I do not accept that position. Apart from the fact that the officer made no mention or finding about a failure to pay a fee, this submission is a technical attempt to bootstrap the officer's failure to consider the applicants' alternative request. In addition, it is at least arguable that no fee was required due to the extant H&C application under subs. 25(1): *IRPR*, paragraph 298(2)(*b*).

[66] At the hearing of this application, counsel for the respondent advised that there was a practice that a "regular" TRP application be considered with the subs. 25(1) application, not with an application under subs. 24(1) in respect of human trafficking. Without more specific evidence of such an administrative practice, I am unable to give effect to this submission.

[67] For these reasons, the officer made a reviewable error by failing to consider the applicants' alternative request for TRPs on its merits.

Remedy

[68] In my view, the appropriate remedy is to allow the application in part and remit the applicants' alternative request for TRPs under subs. 24(1) for a decision by another officer, limited to grounds other than whether the factual circumstances constitute human trafficking. I note that in three recent cases, this Court has returned TRP applications for determination or redetermination in other circumstances when an officer failed to deal with them alongside an H&C application: see *Li v Canada (Citizenship and Immigration)*, 2020 FC 754 (Elliott J.), at paras 10-11; *Williams v. Canada (Citizenship and Immigration)*, 2020 FC 8 (Norris J.), at paras 52-53, 61 and 67; and *Mpoyi v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 251 (Bell J.), at paras 31-33. For a similar remedy, see also *Vaval v Canada (Citizenship and Immigration)*, 2007 FC 160 (Noël J.).

[69] Based on submissions at the hearing, I understand that Dr Day's report was included with the family's second H&C application. While it may make sense for the officer determining the H&C application to decide the family's application for TRPs to regularize their status, it is not for the Court to identify the appropriate decision maker.

IV. Conclusion

[70] The application for judicial review must be dismissed as it concerns the application for temporary resident permits based on human trafficking. However, the application will be allowed in part and the application for temporary resident permits based on other grounds will be remitted for decision by another officer.

[71] Neither party requested that the Court certify a question for appeal and there is none. There are no grounds for a costs order.

JUDGMENT in IMM-5796-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the officer's decision dated September 12, 2019, is allowed in part. The Court remits for determination, by a different officer, the applicants' application for temporary resident permits under s. 24 of the *Immigration and Refugee Protection Act* on grounds other than whether the factual circumstances constitute human trafficking, pending the final determination of the applicants' request for relief under subs. 25(1).
2. The application for judicial review of the officer's decision dated September 12, 2019, is otherwise dismissed.
3. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.
4. There is no costs order.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5796-19
STYLE OF CAUSE:	XHEVDET SHALA, AJSHE SHALA, ARVRESHA SHALA, JETON SHALA, ARJANITA SHALA, ERJON SHALA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 29, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	APRIL 15, 2021

APPEARANCES:

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