Federal Court  Cour fédérale

Date: 20210707

Docket: IMM-2091-20

Citation: 2021 FC 714

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 7, 2021

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

AB
CD

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated March 5, 2020, by a senior immigration officer [the officer] of Immigration, Refugees and Citizenship Canada [IRCC], refusing to grant the applicants an exemption from the requirement to obtain an immigration visa

abroad on humanitarian and compassionate grounds [H&C application] pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] It is important to note from the outset that the reasons for decision were written solely in English, although the H&C application and almost all the documents submitted were in French. The language of the reasons did not prevent the applicants from reviewing them and taking legal action within the prescribed time frame. However, in light of my finding that the officer committed material errors by rejecting the applicants' H&C application, there is a serious question as to whether the officer, who chose to analyze and make a decision on this file, had the language capability to grasp all its nuances. Although it is not possible to draw firm conclusions about the source of the officer's misunderstandings, the inadequacy of his knowledge of French is arguably one of them.

II. Preliminary matter

[3] Prior to the hearing of this application, the applicants brought a motion asking the Court to render its decision in this case anonymous by replacing their names with AB and CD in the style of cause where they are identified by their names. Justice Sylvie Roussel granted an interim anonymity order on April 8, 2021. She left it to the judge hearing the judicial review application to determine whether the order should be permanently maintained.

[4] I note that the officer acknowledged in his decision that the principal applicant, AB, is a victim of domestic violence. I also note that she fears possible reprisals and harmful

repercussions for her and her son, applicant CD, who is 14 years of age. In my view, these are valid reasons that would justify granting a permanent anonymity order.

III. Factual background

[5] Although the applicant grew up and lived in France, she left France in 2008 at the age of 33 to follow her spouse and father of CD to Singapore, where they lived until 2016. In these reasons, the latter will be referred to as the "spouse".

[6] The applicants arrived in Canada in September 2016. They have been living in Montréal since then.

[7] Their status in Canada was dependent on the spouse's work permit.

[8] The applicant remained in an abusive and violent relationship with her spouse for 24 years. She suffered emotional, physical and financial abuse in a relationship characterized by various forms of control and devaluing of her.

[9] The couple is now separated and involved in divorce proceedings in the Superior Court of Montréal.

[10] On February 7, 2020, the applicants filed applications for Temporary Resident Permits [TRPs] for victims of domestic violence.

[11] A few days later, on February 13, 2020, the applicants filed an H&C application with a number of supporting documents, including a psychological assessment report that testified to the applicant's fragile state of psychological health and her ongoing struggle to rebuild her self-esteem and independence. Among the various criteria characteristic of an abusive relationship with a long-term impact on the applicant's personality, the report cites the following: a climate of physical and emotional insecurity; a climate of coercion, control and isolation; feelings of inferiority, worthlessness and humiliation; a climate of guilt and a feeling of incompetence; and feelings of confusion and doubt.

[12] The application was refused by the officer on March 5, 2020. It is that decision that is the subject of this application for judicial review.

[13] The TRP applications were approved by IRCC on March 11, 2020.

IV. The officer's decision

[14] As noted above, the officer recognized and took into account the spousal abuse the applicant endured. However, he concluded that returning to France would allow the applicant to escape her spouse's clutches. The officer added that he had little information on file to explain why the entire family could not relocate to France.

[15] The officer concluded that the applicant has little establishment in Canada. He noted that she has only lived in Canada since 2016, has a very modest income and has no family in Canada.

[16] As for the psychological report, the officer concluded that the psychologist did not diagnose the applicant with a mental health problem and did not indicate that the applicant should receive psychological follow-up, treatment or medication.

[17] The officer recognized that the applicant would undergo an adjustment period in resettling in a country she left more than 10 years ago. However, the officer concluded that her return to France would not be any more difficult than her previous moves to Singapore and Montréal.

[18] Having considered all the factors which the applicants mentioned in their H&C application, the officer concluded that those factors were not sufficient for the applicants to be granted an exemption on humanitarian and compassionate grounds. Accordingly, the application was rejected.

V. The issue

[19] The sole issue is whether it was unreasonable for the immigration officer to conclude that there were insufficient humanitarian considerations to exempt the applicants from the requirement to file an application for permanent residence outside Canada.

VI. Standard of review

[20] The Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at paragraph 44, confirmed that the standard of review applicable to an H&C decision is reasonableness.

[21] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The reviewing 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*, paras 15, 99).

VII. Analysis

[22] The applicants raise three issues: (1) did the officer err in concluding that the applicants' interest in remaining in Canada is temporary in nature; (2) did the officer err in his analysis of the evidence related to the violence suffered and the unusual hardship that resulted for the applicant; and (3) did the officer err in his analysis of the best interests of the minor child. I will deal with each issue in turn.

A. *Did the officer err in concluding that the applicants' interest in remaining in Canada is temporary in nature*

[23] The officer mentioned that the applicants had pending TRP applications to remain in Canada temporarily so that the family proceedings could be finalized. However, there is nothing in the H&C application that would allow the officer to reach that conclusion.

[24] First, it is simply stated in the application submitted by the applicants that they filed a TRP application for victims of family violence. As explained by the applicant, she and her son had indeed applied for TRPs for victims of family violence, a program showing the particular intent of the government to give victims the chance to get out of violent situations without fear of losing their status in Canada.

[25] The applicable IRCC guidelines for eligibility for this TRP specify as follows:

> In assessing eligibility for a TRP, the officer considers if the foreign national is
>
> - physically located in Canada and experiencing abuse, including physical, sexual, psychological or financial abuse or neglect, from their spouse or common-law partner while in Canada
>
> - seeking permanent residence that is contingent on remaining in a genuine relationship in which there is abuse and if the relationship with the abusive spouse or common-law partner is critical for the continuation of the individual's status in Canada
>
> Au moment d'évaluer l'admissibilité au PST, l'agent évaluera si l'étranger :
>
> - est effectivement présent au Canada et est victime de violence, y compris la violence physique, sexuelle ou psychologique, l'exploitation financière ou la négligence,

> de la part de son époux ou conjoint de fait durant son séjour;
>
> - souhaite obtenir le statut de résident permanent, ce qui l'oblige à demeurer dans une véritable relation où la violence est présente, et si cette relation avec l'époux ou le conjoint de fait violent est essentielle au maintien du statut de l'étranger au Canada.

[26] The entire TRP structure for victims of family violence is one of urgency (temporary in nature) whose aim is to allow victims the time and stability necessary to apply for permanent residence, where applicable. In the circumstances, it was unreasonable for the officer to conclude that the applicants' interest was temporary in nature on the mere pretext that TRP applications were pending. It was even more unreasonable to speculate on the reason underlying said TRP applications.

[27] Second, the evidence on record shows that the spouse indeed intended to move to Canada permanently. In her affidavit filed in support of the H&C application, the applicant states that a few months after their arrival in Montréal, her spouse's company's law firm [TRANSLATION] "is in charge of the permanent residence application record for the three of us". Her spouse decided to withdraw the application for permanent residence in 2018 so that their son could pursue his education in the English school system. The applicant learned that she could not be included in the application for permanent residence following her separation from her spouse. She stated that her spouse harassed her and blackmailed her into signing an immigration document that would have allowed her spouse to immigrate to Canada with her son and without her.

[28] This error in assessing the evidence is in itself sufficiently serious to justify setting aside his decision. But there is more.

B. *Did the officer err in his analysis of the evidence related to the violence suffered and the unusual hardship that resulted for the applicant*

[29] The applicants submit that while the officer recognized that the applicant was the victim of spousal abuse, he failed to understand the impacts and arrived at an unreasonable conclusion with respect to the unusual hardship the applicant would face if she were to return to France. I agree.

[30] The officer did not appear to handle the H&C application with the attention and compassion that ought to have been provided to the applicant, a victim of spousal abuse who was deprived of the opportunity to become a permanent resident as a result of the termination of an abusive relationship.

[31] For example, the psychological report clearly states that the applicant has an adjustment disorder with anxiety based on the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders) classification. The report even specifies that she had a fairly high score on symptoms of anxiety and that the score is [TRANSLATION] “clinically significant and warrants special attention”.

[32] The officer concluded, however, that the psychologist did not diagnose the applicant with a mental health problem. It is difficult to understand how the officer could come to such a conclusion despite the evidence to the contrary.

[33] The whole of the officer's analysis of the hardship the applicant would suffer in leaving Canada and the impact that such an uprooting would have on the minor child is thus vitiated by a determinative factual error.

C. *Did the officer err in his analysis of the best interests of the minor child*

[34] In the decision, the officer noted that the applicant and her spouse, temporary residents in Canada, separated in Canada. The officer noted that there is little evidence that it would be detrimental to the interests of CD to live in a single parent family with his mother in France. The officer further noted that it appears that the mother's separation from her spouse is beneficial to CD's well-being. Even if the applicant and her spouse lived in separate homes, CD would continue to witness his father's aggressive behaviour towards his mother. The officer concluded that the spouse's behaviour towards the applicant is detrimental to the health and safety of CD.

[35] However, nothing in the record allowed the officer to conclude that CD would necessarily return to France with his mother if the H&C application were rejected. Indeed, a number of elements show that there is a possibility that he may end up staying in Canada with his father, depending on the outcome of the family proceedings instituted by his parents. To conclude otherwise would be pure speculation on the officer's part.

[36] Furthermore, with respect to the analysis of the consequences for CD upon his return to France with his mother, the officer's decision lacks intelligibility in that he does not explain why he did not consider CD's desire to remain in Quebec with both parents, or the fact that the child himself states in his letter that if he were separated from one of his parents, he would become depressed and could develop anger problems. The officer also does not address the detailed comments made by the applicant in her affidavit regarding the unusual relationship she has with her son and the difficulties that he has already had to go through in the past as a result of the family situation, in particular the fact that he considered Singapore to be his country and that he initially had a very difficult time moving to Montréal.

VIII. Conclusion

[37] I am fully aware that an H&C exemption is an exceptional and discretionary remedy. Furthermore, I recognize that the onus of establishing that an H&C exemption is warranted lies with the applicant and that the officer's determination is entitled to deference from a reviewing court.

[38] I find, however, that the applicants have successfully shown that the reasons for decision contain a serious misapprehension of the evidence entered in the record that fundamentally vitiated the officer's reasoning. In my view, the reasons do not reflect the qualities of transparency and coherence that are integral to a reasonable decision.

[39] The application for judicial review is therefore allowed.

[40] Neither party has submitted any questions of general importance for certification.

[41] In closing, I would like to add that I do not find persuasive the respondent's argument that, in the absence of a request for translation of the officer's reasons and evidence of any prejudice to the applicants, no breach of the duty of procedural fairness has been demonstrated in the circumstances.

[42] In this case, the applicants did not wish to raise this issue in light of their ability to adequately avail themselves of their legal remedy before this Court. I cannot, however, ignore my strong disagreement with a practice that allowed IRCC officers to write their reasons for decision in an official language other than the preferred correspondence language of an applicant, as reflected in their application form.

JUDGMENT in IMM-2091-20

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The matter is referred back to IRCC for reconsideration by another officer of the applicants' application for an exemption from the requirement to obtain an immigration visa abroad based on humanitarian and compassionate grounds.
3. No question of general importance is certified.

"Roger R. Lafrenière"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2091-20
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