Federal Court  Cour fédérale

Date: 20211026

Docket: IMM-7618-19

Citation: 2021 FC 1139

Ottawa, Ontario, October 26, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

JULIA HERNANDEZ DEMETRIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Julia Hernandez Demetrio, seeks judicial review of a negative decision of her application for permanent resident on humanitarian and compassionate ("H&C") grounds dated December 6, 2019.

II. Background

[2] The Applicant came to Canada on April 28, 2008, stating that she departed Mexico to flee from her sister Maria, who was demanding her car and house.

[3] The Applicant made a claim for refugee protection on May 10, 2010, which was denied on October 24, 2011, for omissions in the Personal Information Form, delay in claiming protection, and negative credibility. Application for leave and judicial review of this Refugee Protection Division ("RPD") decision was not granted on February 23, 2012. A warrant was issued for the Applicant's arrest on October 9, 2012, when she did not show up for removal arrangements. Her permanent residency application was refused on June 19, 2013. She was arrested on September 23, 2016. She received a negative Pre-Removal Risk Assessment on February 3, 2017, and departed Canada on June 23, 2017.

[4] The Applicant's husband made a separate claim for refugee protection that was unsuccessful and is not part of this claim. He was removed from Canada in 2016. She indicated she met her husband in Canada, and started her family here.

[5] The Applicant's grounds for H&C are based on the Applicant's fear from her sister (as she put it, "abuse, abduction, and possible murder in Mexico at the hands of [her sister] or [her sister's] criminal associates", her establishment in Canada, and the best interests of the Applicant's two Canadian children (6 years old and 3 years old, respectively).

[6] The Applicant cited a number of incidents involving her sister that caused her to fear for her safety. These incidents included:

- an alleged attack and attempt to kidnap the Applicant's daughter, Danna, by her sister's associates;
- threats by her sister and her sister's associates to the Applicant's family since their return to Mexico; and
- a history of violence "at her sister's bidding" for many years.

Her sister is currently in prison, for unknown reasons and an unknown duration, though she is by the Applicant's account trying to get out of prison and continues to threaten the Applicant and her family whilst in prison.

[7] The Applicant's fear of her sister was rejected by the RPD when the Applicant made her claim for refugee protection. Determinative in this finding was that "the claimant did not provide sufficient credible and trustworthy evidence to support her fear of returning to Mexico … there were a number of significant omissions in her narrative" which were not sufficiently explained. As well the RPD found that inconsistencies between the Applicant's oral evidence and documentation, and had concerns with the delay in initiating her claim for protection.

[8] With respect to her concerns about the best interest of the children ("BIOC"), the Applicant submits that Danna has developed respiratory illnesses which are controlled in Canada but may be triggered by the heat and humidity of Mexican weather. She also remarked that the children are unable to enjoy the educational or recreational activities that children their age

engage in due to threats and insecurity in Mexico and negative conditions in Mexico for children. The Applicant stated that schools in Mexico have refused to register Danna given that she is not a Mexican citizen, and that the Applicant cannot afford to apply for Mexican citizenship. The Applicant indicated that her health and that of her partner has worsened in Mexico, as she has been unable to see a doctor due to cost and not having the time.

III. Issue

[9] The issue is whether the decision was reasonable.

IV. Standard of Review

[10] The standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov* [*Vavilov*], 2019 SCC 65).

V. Analysis

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

(1) Unreasonable influence by the previous negative decisions, and history of, the Applicant

[11] The Applicant submits that the Officer's discretion was unreasonably fettered by the previous negative decisions (dealing with the Applicant's credibility, as assessed by the RPD). They cite *Kanthasamy v Canada*, 2015 SCC 61 [*Kanthasamy*], for the role of Officers in making H&C determinations under s. 25(1). The Applicant argues that the status of H&C as an

"exemption" from the normal application process means that it ought to be interpreted flexibly and equitably.

[12] The Applicant said that the Officer relied heavily on the previous RPD findings that found that she was not credible, and thus when dealing with new evidence did not deal with it adequately or intelligibly. The Applicant suggests it is impossible to tell what linkage would be sufficient, concluding that her sister's criminal acts and her own feared hardship are indistinguishable.

[13] The Applicant notes another piece of evidence the Officer did not consider is a letter by a Legal Clinic in Mexico. This letter in the views of counsel corroborated the Applicant's assertions about her sister. As well there is a psychological evaluation which found that the Applicant's mental status is "in keeping with an individual who was experienced significant trauma and is consistent with the sequela of abuse … described…" She cites new evidence of two attempted abductions of, Danna, coupled with photographic evidence and a doctor's note and report. Another piece of evidence she mentioned is a new affidavit by a third party, as well as her own affidavit, which both purport to illustrate that the Applicant attempted to report the attempted abductions to the authorities.

[14] In sum, on this point, the Applicant submits that the Officer did not meaningfully engage with new evidence which was not before the RPD in coming to their conclusion that the RPD's previous credibility finding was not overcome by the Applicant in this application.

[15] I find no error in the decision-maker's determination on the evidence contained in the Certified Tribunal Record ("CTR"). In *Miyir v Canada (Citizenship and Immigration),* 2018 FC 73, Justice Diner wrote that that it is a difficult task to overcome a previous negative credibility finding when applicants seek to present a story which was already not found to be credible by the RPD. This is particularly the case when the Applicant's new evidence is merely a corroborative of a story already found not to be credible (*Gomez v Canada (Minister of Citizenship & Immigration),* 2005 FC 859 at para 5). This is what happened here. The Officer did not refer to every single piece of new evidence before him, or deal with each instance of hardship, and he did not need to. Rather, he was deferential to the RPD's credibility findings, and found the Applicant's story as a whole not to be credible. If the story as a whole is not credible, further evidence or argument which merely doubles down on this story will not "move the needle" of credibility so to speak unless it provides sufficient linkage to establish that the claims which were previously non-credible now appear to be credible (*Gomez v Canada (Minister of Citizenship & Immigration),* 2005 FC 859).

[16] For instance, the submitted newspaper article reporting an investigation of the Applicant's sister for abuse of her grandchildren is merely corroborative of the same story about threats from her sister which the RPD found not to be credible. In response to the Applicant's submission that "it is impossible to tell what linkage (between facts and the Applicant's feared hardship) would be sufficient," I would simply opine that credible evidence which links the Applicant's sister's alleged bad behaviour to a real threat to the Applicant's children would provide such a link. At present, there is no such credible evidence. The Applicant's sister can be a criminal without being a present threat to the Applicant or her children, and based on the

evidence before him, the Officer reasonably concluded there was insufficient evidence to link the two.

[17] In response to the Applicant's submission that the Officer did not deal with various specific pieces of evidence before him, such as a psychological evaluation this is covered in the Officer's statement that they have reviewed all of the evidence, but will only make specific reference to some of it. This was quite reasonable, in light of the voluminous submissions by the Applicant. As explained by Gleason J (as she then was) in *Kakurova v Canada (Citizenship and Immigration)*, 2013 FC 929 at paragraph 18 [*Kakurova*], "it is not necessary … to refer to all of the … evidence or to deal with every argument advanced." When dealing with a record of approximately 1,000 pages, Gleason J wrote that "it would be overwhelmingly burdensome for the Board to specifically cite every point in the evidence … all it was required to do was to review the evidence and reasonably ground its finding in the materials before it" (para 18). The Officer did exactly that in this case in a far larger record than in *Kakurova*.

[18] The Applicant declared that the Officer's discretion was unreasonably fettered by the previous negative decisions (dealing with the Applicant's credibility, as assessed by the RPD). The Applicant cited *Kanthasamy*, for the role of officers in making H&C determinations under s. 25(1) and that the status of H&C as an "exemption" from the normal application process means that it ought to be interpreted flexibly and equitably.

[19] Contrary to the Applicant's interpretation, *Kanthasamy* (at para 51) does not stand for this. It does not emphasize a flexible and equitable use of the Officer's discretion, but rather it

simply sets out that the Officer's role under s. 25(1) is to determine whether the evidence meets the H&C exemption from the normal application of the *Immigration and Refugee Protection Act*, (SC 2001, c 27) [IRPA]. The word "exemption" does not, by its very nature, mean that the thing itself ought to be interpreted flexibly or equitably – it simply means to be free from something, such as not being required to meet other steps in a process, as is the case here.

(2) Best interests of the children

[20] On this issue, the Applicant submits that the Officer did not define the BIOC here, and as a result could never intelligibly articulate his reasoning on this point. The Applicant cites *Kanthasamy*, at paragraphs 39 to 40, for the proposition that the BIOC must be sufficiently considered or a decision will be found unreasonable, and that sufficient consideration includes more than simply stating that the interests of the child has been taken into account; rather, the interests must be examined with a great deal of attention in light of all of the evidence.

[21] In light of this, the Applicant suggests that the evidence provided demonstrates that the children have benefitted from their Canadian citizenship (in terms of cultural connections, social bonds, and safety), and that taking this away would be contrary to the BIOC.

[22] The Applicant argued that the Officer unreasonably disregarded an expert legal opinion regarding BIOC submitted by the Executive Director of the legal clinic Justice for Children and Youth, based in Toronto.

[23] In the alternative, the Applicant said that the Officer may have made a "veiled credibility finding" regarding this evidence, and is asserting that the underlying facts are not credible.

[24] I find that the Officer dealt with the BIOC reasonably. He did not, as alleged by the Applicant, simply state that the best interests of the children had been taken into account without engaging in a deeper analysis. Rather, he spent the largest portion of his analysis focused on it. Nor did he make veiled credibility findings. Below I have addressed the specific arguments regarding the BIOC as well as related issues argued by the Applicant.

(a) *Health Concerns*

[25] The Officer acknowledged the Applicant's daughter's asthma and other respiratory illnesses, and that the environmental factors can negatively impact this. The Officer then noted both that asthma is a global problem and that there was insufficient evidence before him establishing a link between her daughter's conditions and the environment in Mexico specifically, or detailing the daughter's health situation in Mexico with "objective documentary evidence." On the contrary, the Officer noted that the Ministry of Health in Mexico provided secondary care and medication for conditions of this type, specifically for asthma.

(b) *Schooling Concerns*

[26] On the issue of the children's schooling, the Officer concluded that the Applicant had submitted insufficient evidence to support the veracity of her claim that the children were unable to attend Mexican school nor apply for Mexican citizenship. The onus is on the Applicant and a

review of the CTR makes the determination of the Officer that there was insufficient evidence regarding the Mexican schooling and citizenship is reasonable and supportable.

(c) *Holistic Assessment*

[27] I disagree with the Applicant's assertion that all the Officer did was "treat the best interests of the child evidence provided as clay targets on fence posts, attempting to shoot each one down in turn with complaints of inadequate evidence, rather than conducting the holistic and compassionate assessment of the children's interests required by *Kanthasamy*." The Officer holistically assessed all of the credible evidence before him, dealt with it both individually and as part of the broader whole. This is demonstrated in the concluding paragraph of the reasons, which reads that "…separately and cumulatively, I do not find the Applicant's personal circumstances are … sufficient". There was, simply, very little credible evidence which had a sufficient link to H&C grounds before the Officer. For the Officer to formulate a holistic understanding, they are not required to accept evidence with little corroborative information nor that with insufficient link to the claims advanced by the Applicant. The Officer is required to assess all of the evidence with the aforementioned "great deal of attention" in a manner that is flexible, equitable, and attuned to "the specific circumstances of the case." The Officer, in the specific circumstances of this case, found that the evidence, both in part and as a whole, was insufficient. This was reasonable.

(d) *Treatment of "Expert" Opinion*

[28] Regarding the Applicant's submission that the Officer unreasonably disregarded an expert legal opinion regarding BIOC submitted by the Executive Director of the legal clinic Justice for Children and Youth, the Officer did deal with it in a rather cursory manner after noting specifically that he accepted it. However, when interpreted in the broader context of all of the evidence, this makes sense. It can be reasonably inferred from his word "I accept" and his further analysis that while he accepts the analysis, it is merely one piece of the broader context of this determination, and it is one of many factors he can consider.

(e) *Use of Hardship vs. Personalized Risk Test*

[29] The Applicant suggests that the Officer unreasonably applied the refugee protection test of "personalized risk" when dismissing the Applicant's concerns about the best interests of her children in Mexico as "general country conditions." The Applicant cites Justice Diner in *Miyir v Canada*, 2018 FC 73, for the proposition that the personalized risk required in refugee claim analysis has no place in an H&C analysis. It is true that this is what the case says, and on its face it may look like it renders the Officer's decision unreasonable given that he did focus on the general country conditions quite significantly. However, this does not mean that the Officer cannot consider the Applicant's concerns relative to the broader conditions of the country. Justice McHaffie in *Arsu v Canada (Citizenship and Immigration)*, 2020 FC 617 at paragraph 16 summarized this point well as follows:

> As the Arsus correctly point out, the relevant inquiry on an H&C application is not whether the Applicants will suffer a greater degree of discrimination than others, or hardship that is different

> from the remainder of the population, but whether they would likely be affected by adverse conditions such as discrimination. However, I do not believe that this precludes an Officer from assessing how an Applicant's particular circumstances relate to the broader country condition evidence, in terms of the degree of risk or extent of harm they may be facing. In other words, if country condition evidence presents a range of risks or hardship that may be faced by returning nationals, it is appropriate for an Officer to assess where on that spectrum the H&C Applicant lies in order to conduct the "meaningful, individualized analysis" that is required. This may include noting that while the H&C Applicant is on the spectrum of risk of hardship described in the evidence, they are not at the top end of that spectrum.

[30] The Officer in this case does, in concluding that these are not only concerns of the Applicant (credibility notwithstanding) but simply concerns in Mexico more broadly. It is understood that more than likely the conditions in Canada for children are better than elsewhere but that in itself is not enough.

(f) *The Officer's Comment on Family Reunification*

[31] The Officer commented that by sending the Applicant and her children back to Mexico, they would be reunited with their father, thereby fulfilling one of the goals of Canadian immigration law – family reunification. Though I agree with the Applicant that the goals of the IRPA "to see that families are reunited in Canada" is not served by this given the reunification is in Mexico, this comment by the Officer is not determinative of the decision nor does it make the decision overall unreasonable. It was simply an additional comment by the Officer which was a misstep but not such to make the decision unreasonable

(3) Did the Officer fail to reasonably assess new evidence?

[32] On this issue, the Applicant submits that the Officer unreasonably discounted some evidence which was not tied to the credibility findings by the RPD.

[33] Two such pieces of evidence, in the view of the Applicant, are psychological assessments of the Applicant by Doctors, which showed that she was depressed with symptoms of Post-Traumatic Stress Disorder ("PTSD"), deterioration of mental health, and the impact on children living with parents suffering from these. The Applicant argues that the Officer did not even mention these, which allegedly shows he did not conduct a holistic assessment of the evidence, rendering it unreasonable.

[34] The Applicant further submits that the Officer ignored evidence of the Applicant's establishment in Canada, by virtue of leaving that box blank in the "factors for consideration" page of his decision. She stated that the Officer unreasonably did not examine her work history, letters of support from community members, and that as a result, the decision was unreasonable.

[35] A final argument is related to whether the Officer dealt with new evidence not tied to the credibility findings by the RPD. The Applicant submits that the Officer did so unreasonably, while the respondents submit the Officer did so reasonably.

[36] The two types of evidence the Applicant submits the Officer failed to reasonably assess are (1) two psychological assessments of the Applicant by doctors, and (2) the Applicant's establishment in Canada.

[37] On the issue of the medical reports, it is reasonable that given the large amount of submissions before him, he would not make specific note to all of them. The Officer, in paragraph 5 of his decision confirmed as much – that he had read all of the materials, but would not make specific reference to all of them. It is clear that there is no requirement for a decision maker to include all arguments or analysis that the reviewing judge would have been preferred (*Vavilov*, at para 91). The psychological evaluations showing depression, symptoms of PTSD, deterioration of mental health, and similar other issues, are merely corroborative of the story the Applicant has already told. This is particularly the case where the same arguments are made repeatedly, as is the case here – the decision-making Officer would've added little to his analysis by noting the doctor's reports that he had not already dealt with (i.e. the Applicant's personal circumstances and the situation in Mexico).

[38] On the establishment issue, while the Officer did leave the box on establishment in "factors for consideration" blank, he specifically noted in the third paragraph of his decision and reasons that the Applicant's establishment in Canada was one of the factors he considered. As set out in *Vavilov*, "reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis" (para 128). This means that the Officer is not required to deal comprehensively with each and every issue before him. Rather, the decision-maker must demonstrate that it was "alive to (the) essential elements," and that their chain of

analysis was reasonable. Given that much of the establishment in Canada was gained while unlawfully residing in Canada and that establishment is simply one of many factors to be considered in an H&C analysis, it is sufficient on reasonableness review for the Officer to have made direct reference to it. The Officer specifically acknowledged her establishment as part of the application but that it was insufficient. This demonstrates that he was alive to the issue and considered its relevance, despite not writing comprehensively about it.

[39] I find that the decision was reasonable and will dismiss the application.

[40] No question for certification was presented.

JUDGMENT IN IMM-7618-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. There is no question for certification.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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