Federal Court  Cour fédérale

Date: 20211209

Docket: IMM-3009-20

Citation: 2021 FC 1387

Toronto, Ontario, December 09, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

NAGESWARY SINNATHAMBY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] On this application for judicial review, the applicant seeks to set aside a decision by a senior immigration officer dated June 24, 2020, made under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). The applicant filed an application for permanent residence from within Canada on humanitarian and compassionate ("H&C") grounds.

[2] The officer decided that an exemption from the requirement to apply for permanent residence from outside Canada would not be granted on H&C grounds. The applicant contends that the officer's decision should be set aside because it is unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[3] For the reasons below, I agree that the decision was unreasonable on *Vavilov* principles. The application will therefore be allowed.

I. Facts and Events Leading to this Application

[4] The applicant is a citizen of Sri Lanka. She is a 63 years old Tamil woman from the northern part of that country. Her husband disappeared in 1990 during the country's civil war and is presumed dead. She has one child, who is a Canadian citizen and resides in Brampton, Ontario. She has three grandchildren, two of whom were born before the application was filed.

[5] On August 24, 2013, the applicant entered Canada on a "super visa" and remained in Canada on valid temporary status. Since arriving in Canada in 2013, she has lived with her daughter, son-in-law and their children (born in 2012, 2014 and 2018). Her daughter and son-in-law are employed full-time outside of the home. Both filed letters of support, and a joint letter of support, with the application.

[6] On September 26, 2018, the applicant submitted an application for permanent residence in Canada, relying in part on the hardship, discrimination and country conditions she would face if she returned to Sri Lanka given her age, gender, marital status (a widow, who would live alone

on her return), family status (one child, in Canada), Tamil ethnicity and residence in northern Sri Lanka. In addition, she relied on the best interests of the children ("BIOC").

II. The Decision under Review

[7] The officer who refused her application considered the following factors in the decision: degree of establishment in Canada; hardship in Sri Lanka; best interests of the children; alternative immigration programs; and return to country of nationality. I will refer to the officer's findings only as necessary to explain the reasons for my decision.

[8] The application for H&C relief focused considerably on the hardship the applicant expected to suffer as a Tamil war widow who would live alone on her return to Sri Lanka.

[9] With respect to the applicant's status as a widow, the officer stated as follows:

> Counsel for the applicant states that she lost her spouse as a result of the civil war in Sri Lanka and has submitted a letter authored by the applicant's brother addressed to the Justice of the Peace of the Vavuniya district regarding the status of her spouse. The letter appears to have a typed postscript on the body of the letter itself in identical size and font is the letter, and is signed but not dated nor sealed by an un-named "Justice of the Peace". It is noted that separate responses from the government, or other authorities such as law enforcement confirming the spouse's disappearance have not been submitted.

[10] The officer stated that counsel for the applicant had submitted excerpts from country documentation and set out the applicant's position that she would be returning to a "war torn country that remains in tatters … without the necessary protections and reparation needed for [her] to be secure... Moreover, as a woman living alone in a gendered and patriarchal society, she is at a very real risk of mistreatment from state authorities and other militant groups".

[11] The officer noted that lacking evidence to the contrary, the applicant had lived in Sri Lanka for the majority of her life, including the duration of the civil war and its aftermath. The officer stated that the applicant had "not submitted evidence that during this time she experienced negative treatment from the aforementioned groups or that she otherwise continues to be at risk in the country."

[12] From the information provided by the applicant, the officer concluded that she and her siblings all lived at the same address in northern Sri Lanka. To the officer, the evidence did not support that the applicant would be living alone on her return. In addition, it was not demonstrated that her family members would not be able to assist with her reestablishment there. The officer found that the applicant was financially stable, with savings accounts and property in Sri Lanka. It was therefore feasible for her to return to Sri Lanka.

[13] The officer considered the best interests of the grandchildren, who were then seven and five years old. The officer noted that the applicant provided care for the two children while the parents were at work, preparing cultural food, teaching the grandchildren the Tamil language and reading them bedtime stories. The applicant had not submitted evidence such as letters from the children's teachers, doctors or other trained professionals that her removal would be contrary to their best interests. It was not demonstrated that their cultural education could not continue without her. The evidence did not demonstrate that the applicant's daughter and son-in-law were unable to provide adequate support to their children in her absence; although they both work full-time outside the home, the officer found that the need for childcare was not atypical for Canadian families. The officer was not satisfied that her removal would affect the parents' ability to act as the children's primary caregivers to the extent that it will be detrimental to their best interests.

[14] The officer noted that the applicant has potential alternative immigration programs that would allow her to permanently reside in Canada, including a family class sponsorship via her daughter. In addition, the officer noted that the applicant possessed a “super visa”, valid until 2025.

[15] The applicant challenged the reasonableness of the officer’s decision. With respect to the hardship she would suffer, the applicant submitted:

- the officer made a reviewable error by making no clear finding on whether the officer accepted that the applicant was a widow, and no clear finding on whether her brother’s letter to the Justice of the Peace was authentic;
- the officer erred in law and disregarded the evidence that her husband had died during the time of war, when the officer found that the applicant had not submitted evidence that she had experienced negative treatment in Sri Lanka in the past;
- the officer erred by not considering the country condition evidence relating to similarly situated individuals, and by dismissing the applicant’s position on the basis that she would not live alone on her return to Sri Lanka but would be living with her siblings.

[16] The applicant also submitted that the officer did not consider the best interests of the children, but rather considered only their basic needs.

[17] The respondent sought to demonstrate the reasonableness of the officer’s decision, emphasizing that on the evidence, the applicant would not be living alone in Sri Lanka but

would, instead, be living with her brother and other siblings. According to the respondent, the applicant was therefore not similarly situated to the individuals mentioned in her application and the country condition documents she relied upon. The respondent submitted that the officer reasonably addressed the applicant's position as set out in her application, which focused on her alleged future mistreatment and hardship in Sri Lanka living alone as the head of her own household. In essence, the officer found that the applicant could return to her former, pre-2013 situation.

[18] The respondent took the position that the officer had properly assessed the BIOC.

III. Analysis

A. *Standard of Review*

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

[20] Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions: *Vavilov*, at paras 12-13. 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.

[21] The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. 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*, at paras 85, 90 and 99. The reviewing court must read the reasons holistically and contextually, and in conjunction with the record that was before the decision-maker: *Vavilov,* at paras 91-96, 97 and 103. See also *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-32.

[22] The Supreme Court in *Vavilov*, at paragraph 101, identified two types of fundamental flaws that may lead a reviewing court to conclude that a decision was unreasonable: a failure of rationality internal to the reasoning process in the decision; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.

B. ***Was the Officer's Decision Unreasonable?***

(1) The Applicant's Status as a Widow and the Authenticity of the Letter to the Justice of the Peace

[23] The applicant submitted that the officer failed to make a clear finding of fact about whether the applicant's status as a widow was accepted or rejected. In addition, the applicant maintained that the officer failed to make a clear finding as to the authenticity of the letter sent by her brother requesting that a Sri Lankan Justice of the Peace verify the disappearance of her husband.

[24] The applicant relied on *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082, in which Mactavish J stated at paras 18-21:

> [18] This Court has expressed concerns regarding cases where PRRA Officers have endeavoured to avoid the use of the word "credibility" in the hopes of avoiding a hearing: *Uddin v Canada (Citizenship and Immigration)*, 2011 FC 1289 at para. 3, … As Justice Hughes observed in *Uddin*, the intent of the *Immigration and Refugee Protection Act*, its Regulations and the attendant jurisprudence is clear: if credibility is a central issue and is likely to lead to a result unfavourable to the applicant, a hearing should be held. As Justice Hughes observed, "[i]t is not for a PRRA Officer to finesse these requirements by endeavouring to couch what are, in reality, credibility concerns, in language suggesting lack of evidence or contradictory evidence": *Uddin*, above, at para. 3.
>
> [19] The documents in question in this case were attached to an affidavit sworn by Ms. Sitnikova, who stated under oath that the documents were obtained from the individuals identified as the authors of the emails and letters. She was, therefore, attesting to their authenticity as documents emanating from the sources identified in the documents themselves. In choosing to give the documents "little weight", the Officer was implicitly finding Ms. Sitnikova's sworn statement regarding the provenance of the documents not to be credible. In such circumstances, the Officer was obliged to provide Ms. Sitnikova with an oral hearing: *Uddin*, above; *Rajagopal v. Canada (Citizenship and Immigration)*, 2011 FC 1277, 6 Imm. L.R. (4th) 130.
>
> [20] This Court has, moreover, previously commented on the practice of decision-makers giving "little weight" to documents without making an explicit finding as to their authenticity: see, for example, *Marshall v. Canada (Citizenship and Immigration)*, 2009 FC 622 at paras. 1-3, … and *Warsame v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1202, at para. 10. If a decision-maker is not convinced of the authenticity of a document, then they should say so and give the document no weight whatsoever. Decision-makers should not cast aspersions on the authenticity of a document, and then endeavour to hedge their bets by giving the document "little weight". As Justice Nadon observed in *Warsame*, "[i]t is all or nothing": at para. 10.
>
> [21] That said, it is, of course open to a decision-maker to explain why he or she is not satisfied that a document that has been

> accepted as genuine should be given much weight: *Marshall*, above at para. 3.

[25] The respondent provided no reason why the principles set out in *Sitnikova* (which concerned a pre-removal risk assessment) should not apply in the present context of an H&C application.

[26] The applicant also referred to Justice Ahmed's statement in *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390, that "[f]act finders must have the courage to find facts. They cannot mask authenticity findings by simply deeming evidence to be of 'little probative value."

[27] Reading the officer's reasons, I agree with the applicant that the officer doubted that she was in fact a widow, but made no express finding on the subject. The officer also doubted the authenticity of the letter sent by the applicant's brother to the Sri Lankan Justice of the Peace, who verified certain facts including that the applicant's husband was a resident of the JP's judicial division and had been missing since 1990 during the period of war. Again, however, the officer made no express finding about whether the letter was genuine or authentic, and moved on to other issues.

[28] The officer's comments in this case are more disquieting than the problems identified in *Sitnikova* and *Oranye*, in that the officer did not make any express conclusions about the applicant's credibility, or about her status as a widow, or about the authenticity of the letter, or about how much weight or probative value the letter should be given. In my opinion, the officer

had to make explicit conclusions and provide reasoning to support any findings adverse to the applicant and her evidence on these issues, particularly given the fundamental importance of her status as a widow to her position on the H&C application. The officer's tarnishing of the evidence was not reasonable and failed to meet the standards of transparency and justification identified in *Vavilov*.

(2) Evidence of Past Mistreatment and of Treatment of Similarly-Situated Individuals in Sri Lanka

[29] The applicant contended that the officer erred by concluding that the applicant had not submitted evidence that, prior to her arrival in 2013, she had "experienced negative treatment from the aforementioned groups" (apparently referring to "state authorities and other militant groups"). The applicant submitted that this conclusion also ignored the evidence, specifically the applicant's loss of her husband during the war.

[30] In addition, the applicant submitted that the officer erred in law because she was not required to provide evidence of personal targeting and past mistreatment in order to establish that she will likely experience discrimination and hardship if returned to Sri Lanka. Instead, she could rely upon her personal characteristics and the ongoing country conditions in the north of Sri Lanka concerning how individuals similarly situated to the applicant were being treated.

[31] The respondent submitted that, on the evidence and the findings of the officer, the applicant was not similarly situated to the individuals she claimed. The respondent submitted that as the officer concluded, the applicant would not be living alone on her return to Sri Lanka.

Instead, the officer found that the applicant would be living with her siblings and therefore would not experience the mistreatment, discrimination or hardship she claimed were being experienced by older, widowed, Tamil women living alone in northern Sri Lanka.

[32] I agree with the applicant that she had no obligation in law to provide evidence of past mistreatment while she lived in Sri Lanka: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at paras 52–56. The consideration of hardship is forward-looking and the applicant was entitled to rely upon evidence of her personal characteristics and evidence as to the treatment of similarly situated individuals in Sri Lanka. It is not clear from the officer's reasons whether the officer erred in law or simply mentioned the absence of such personal mistreatment as an introduction to an assessment of the applicant's possible hardship under current country conditions.

[33] However, after stating that the applicant provided no evidence of past personal mistreatment, the officer failed to consider the applicant's personal characteristics and the treatment of such similarly situated individuals, in order to assess whether she would experience hardship on her return to Sri Lanka. Instead, the officer focused solely on whether the applicant would live alone on her return to Sri Lanka.

[34] The parties made opposing submissions on whether the officer's conclusion on that issue was reasonable on the evidence. It is unnecessary to resolve the point here. In my view, the officer could not limit the analysis to that question and ignore the balance of the applicant's position about her own personal characteristics and the treatment of similarly situated individuals

in Sri Lanka. Considering the submissions made to the officer and the evidence in the record, the officer made a reviewable error by taking such an narrow, restricted approach to the assessment of hardship: *Vavilov*, at paras 126 and 128; *Kanthasamy*, at paras 25 and 53-55.

(3) Other Issues

[35] At the hearing, the parties made submissions on the officer's finding that the applicant would live with her siblings on her return to Sri Lanka, including the evidence in the record before the officer. In this context, it is unnecessary to decide whether the officer's conclusion on this factual matter was reasonable.

[36] Similarly, as a result of the analysis above, it is not necessary to consider whether the officer committed a reviewable error in analysing the BIOC.

(4) Conclusion on Reasonableness

[37] The reviewable errors identified above both render the officer's decision unreasonable under *Vavilov* principles. The decision must be set aside and the matter remitted for redetermination.

IV. Conclusion

[38] For these reasons, the application must be allowed. Neither party proposed a question for certification and none will be stated.

JUDGMENT in IMM-3009-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision of the senior immigration officer dated June 24, 2020 is set aside. The matter is remitted for redetermination by another officer. The applicant shall be permitted to adduce additional evidence and/or make additional submissions on 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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