Federal Court  Cour fédérale

Date: 20220316

Docket: IMM-6410-20

Citation: 2022 FC 360

Ottawa, Ontario, March 16, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

NADIN ESPRIT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Nadin Esprit, seeks judicial review of the decision of a senior immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada, dated August 31, 2020, to dismiss her application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the Officer's decision is unreasonable because the Officer selectively reviewed, ignored and dismissed relevant evidence in their analysis of the best interest of the child ("BIOC") and the impact of removal on the Applicant's mental health.

[3] For the reasons that follow, I find that the Officer's decision is unreasonable. This application for judicial review is allowed.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 44-year-old citizen of Dominica. The Applicant has sole custody of her seven-year-old son ("Nathan"). Nathan's father is a Canadian citizen.

[5] The Applicant states that as a child in Dominica, she lived in poverty, was regularly exposed to violence and was sexually assaulted on multiple occasions by her neighbours.

[6] On May 30, 2004, the Applicant arrived in Canada on a visitor's visa.

[7] The Applicant met Nathan's father in April 2013. The couple separated soon after the Applicant learned she was pregnant, but resumed their relationship for a few months when Nathan was one. The Applicant states she was emotionally abused by Nathan's father.

[8] In 2016, the Applicant and Nathan moved into a women's shelter for approximately one year and received counselling. In December 2019, a licensed psychologist diagnosed the Applicant with Major Depressive Disorder.

[9] On October 30, 2017, the Applicant gained full custody of Nathan. Nathan's father has visitation rights and pays child support. Since the court order, the Applicant states that Nathan's relationship with his father has become an important part of Nathan's well-being.

[10] In December 2019, a registered psychotherapist diagnosed Nathan with Anxiety Disorder. Nathan also frequently experiences abdominal pain and is currently being assessed by medical professionals.

[11] On March 15, 2017, the Applicant submitted a permanent residence application on H&C grounds. Her application was refused on March 19, 2018. On October 18, 2019, the Applicant submitted a second H&C application, which was updated on March 3, 2020.

B. *Decision Under Review*

[12] By letter dated August 31, 2020, the Officer refused the Applicant's H&C application, finding that it did not warrant an exemption under subsection 25(1) of the *IRPA.*

[13] The Applicant's H&C application was based on her establishment in Canada, the BIOC with respect to Nathan, the hardship she would face in Dominica, as well as the Applicant's mental health concerns and trauma connected to the abuse she experienced in Dominica.

[14] The Officer considered the Applicant's establishment in Canada since 2004, and gave some positive weight to the Applicant's relationships and social establishment. While the time spent in Canada is significant, the Officer found that the Applicant's disregard for Canada's immigration laws by overstaying her visa and working without authorization attracted substantial negative weight.

[15] With respect to the BIOC, the Officer found that it would not be in Nathan's best interest to be separated from his mother. However, the Officer found insufficient evidence to conclude that Nathan's best interests would not be served if he were to be separated from his father, given the father's previous "unreliable and neglectful disposition towards his parental obligations to Nathan." The Officer also found that there was insufficient evidence to demonstrate that Nathan's education, health, well-being and development would be adversely impacted by relocating to Dominica. Accordingly, the Officer gave only modest weight to the BIOC.

[16] With respect to the hardships the Applicant would face upon return to Dominica, the Officer found that there was insufficient evidence to conclude that the Applicant would experience poverty, housing insecurity, unemployment or gender-based discrimination in Dominica. In considering the Applicant's mental health, the Officer noted the psychological report on record, which states that the Applicant suffers from Major Depressive Disorder and acknowledged the psychologist's expertise. However, the Officer gave little weight to the report because it was based on the Applicant's "self-reported account of events for which independent corroborating evidence is unavailable, during a single assessment session, which […] is being carried out for the purposes of the client's pending H&C application." The Officer concluded

that there was also a lack of persuasive evidence to support the position that the Applicant would have difficulty accessing mental health supports in Dominica.

III. **Issue and Standard of Review**

[17] The issue in this case concerns whether the Officer's decision is reasonable.

[18] Both parties agree that the Court is to review the Officer's decision on the standard of reasonableness. I agree that the appropriate standard of review for an H&C decision is reasonableness (*Rannatshe v Canada (Citizenship and Immigration)*, 2021 FC 1377 at para 4; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[19] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[20] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. **Analysis**

[21] Subsection 25(1) of the *IRPA* gives the Minister discretion to grant permanent residency to a foreign national who does not meet the requirements of the *IRPA* if the circumstances are justified under H&C considerations, including the BIOC directly affected. In determining whether a case warrants relief, the decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) ("*Baker*") at paras 74-75).

A. *BIOC*

[22] The Applicant's H&C application included a 12-page report written by a Registered Psychotherapist who assessed Nathan in December 2019. The psychotherapy report diagnoses Nathan with Anxiety Disorder. The Applicant submits that the Officer's BIOC analysis failed to adequately assess the psychotherapy report because at no point in the reasons for the decision did the Officer mention Nathan's Anxiety Disorder diagnosis or consider the impact this diagnosis could have on Nathan if he relocates to Dominica. Although the Applicant's removal from

Canada was not the primary consideration of the report, the psychotherapy report concludes that Nathan's anxiety is unlikely to subside if he were to relocate to Dominica with his mother.

[23] The Applicant further submits that the Officer failed to account for the importance of keeping Nathan in contact with both his parents, and specifically to not be separated from his father (*Baker* at paras 67-68). The Applicant contends that the Officer erred by concluding that there was insufficient evidence of the ongoing relationship between Nathan and his father to overcome Nathan's father's "neglectful disposition". The Applicant argues that the Officer selectively reviewed the evidence by only focusing on statements from the psychotherapy report that discuss the difficult start to Nathan's relationship with his father, when Nathan was still only a toddler. The Applicant submits that the record shows this relationship has grown stronger in recent years and contributes to Nathan's feelings of stability and well-being. The Applicant's sworn affidavit explains that since October 2017, Nathan relies on weekly access visits with his father for additional emotional support. The letter from Nathan's father emphasizes how he wishes to continue to develop his relationship with his son. More importantly, the psychotherapy report includes positive comments about Nathan's current relationship with his father.

[24] The Respondent submits that the Officer did not err by considering the psychotherapy report in the context of how the BIOC was presented in the H&C application, in which the Applicant submitted that Nathan would face irreparable emotional and psychological damage if separated from his mother or father. The Respondent argues that there is no merit to the Applicant's argument that the Officer failed to consider the impact of potential removal in the review of the psychotherapy report, given that the primary consideration of the report was to

assess Nathan's anxiety, not the impacts of removal. The Respondent also maintains that the Officer did in fact consider Nathan's current relationship with his father, yet reasonably found insufficient evidence to overcome Nathan's father's previous pattern of neglect.

[25] Overall, the Respondent submits that the Officer's BIOC analysis is reasonable and consistent with the contextual approach promoted in *Kanthasamy* (at paras 35-41) and that the Officer should not be faulted for undertaking a contextual assessment of the evidence presented in the Applicant's H&C application. Relying on *Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327, the Respondent submits that once an officer is 'alert, alive and sensitive' to the interests of any child impacted by a decision, it is the officer's discretion to determine the weight given to the BIOC (at para 56).

[26] I find it problematic of the Respondent to suggest that the Officer's decision is reasonable because Nathan's psychological diagnosis was not part of the 'framework' or 'context' of the Applicant's submissions in her H&C application. I agree with the Applicant's position that if this argument were accepted, it would justify a decision maker ignoring evidence on the record that was not specifically referred to in an applicant's submissions. This contradicts the approach advanced by the Supreme Court in *Vavilov* (at para 126).

[27] Contrary to what the Respondent suggests, I do not find that the Officer appreciated Nathan's circumstances as a whole (*Kanthasamy* at paras 39, 45). While I note that the Officer does refer to the psychotherapy report, it is only in the context of discussing how Nathan may be impacted by the separation from either of his parents. The Officer's decision fails to even

mention Nathan's Anxiety Disorder diagnosis. Instead, the Officer cites the psychotherapy report to point out Nathan's father's inconsistent parenting and to cast doubt on the Applicant's position that Nathan relies on his father for his emotional well-being.

[28] The Officer erred by not considering how a removal to Dominica would affect Nathan's mental health, given his psychological diagnosis. As the Supreme Court found in *Kanthasamy,* it is a reviewable error to fail to adequately assess the implications of removal on a child's mental health in an H&C decision (paras 45-48). The evidence before the Officer demonstrated that Nathan suffers from anxiety that is unlikely to improve if he is to relocate to Dominica. Furthermore, as the Officer acknowledged, Nathan is heavily dependent on his mother, whose mental health would *also* likely be impacted by a relocation to Dominica. As such, I find that the Officer failed to grasp the real life impacts that a negative decision would have on Nathan's best interests, and unreasonably minimized the BIOC (*Baker* at para 75; *Kolosovs v Canada (Citizenship and Immigration),* 2008 FC 165 at para 12).

B. *Applicant's Mental Health Considerations*

[29] The Applicant submits that the Officer erred in their review and weighing of the impact a removal would have on her own mental health. The evidence before the Officer included a report completed on December 11, 2019 by a licensed Psychologist. The psychological report diagnoses the Applicant with "Major Depressive Disorder, Single Episode, Severe," and notes:

> […] given the tenuous nature of her immigration status and the continual depletion of her coping strategies, Ms. Esprit is highly vulnerable to a complete psychological collapse should she be

> required to leave Canada for any amount of time outside of her volition.

[30] The Applicant's sworn affidavit also states that she was diagnosed with chronic Major Depressive Disorder and Post-Traumatic Stress Disorder in November 2016, was prescribed anti-depressant medication, and received counseling through a community health centre.

[31] The Officer considered the Applicant's submissions with respect to her mental health, yet found that there was insufficient evidence related to the Applicant's inability to access mental health care in Dominica and gave little weight to the psychologist's report, reasoning:

> […] I recognize that the diagnosis is predicated on the client's self-reported account of events for which independent corroborating evidence is unavailable, during a single assessment session, which Dr. Pilowsky acknowledges [that] her report is being carried out for the purposes of the client's pending H&C application. These circumstances under which the assessment was undertaken diminish the weight that I am able to grant this consideration.

[32] The Applicant argues that the Officer erred by placing too much weight on the perceived availability of mental health services in Dominica, noting that the very fact that a person's mental health would worsen if removed from Canada is a relevant consideration, regardless of the availability of mental health treatment (*Kanthasamy* at para 48; *Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212 at para 17). The Respondent relies on *Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821, at paragraph 34, to contend that it was reasonable of the Officer to consider the availability of mental health supports in the country of

removal, and to find insufficient evidence showing that the Applicant would not be able to access mental health treatment in Dominica.

[33] While I agree that it was reasonable of the Officer to consider the availability of mental health supports in Dominica, I am not convinced that the Officer adequately considered the evidence demonstrating how the Applicant's mental health would worsen in Dominica and why a return would be especially triggering for the Applicant, given the abuse she previously experienced in Dominica. The psychologist's report notes:

> Please note that the fear Ms. Esprit experiences leaving Canada and returning to her country of origin must be appreciated in the context of her sexual abuse, socialization, and cultural beliefs. This woman not only believes that her abuser will kill her upon return to Dominica, but that if she is in closer proximity to him than she is in Canada, he will be able to engage in witchcraft that will place her at significant vulnerability and harm. Although such ideation may not appear rational to a person of a different cultural background, this is a reasonable, tangible, and realistic fear for the patient that she experiences as very real and an almost certainty. Thus, the psychological impacts of this fear are immense.

[34] The Applicant further submits that psychological reports are not to be dismissed on the basis that they are based on the Applicant's self-reporting of events for which there is no corroborating evidence (*Kanthasamy* at para 49). The Applicant acknowledges that the report was prepared after one session and for the purpose of the H&C application, yet the diagnosis was within the psychologist's expertise, confirms a previous diagnosis, and is reasonable given the significant abuse the Applicant has suffered. The Applicant relies on *Manan v Canada (Citizenship and Immigration),* 2020 FC 150, in which Justice Fuhrer notes at paragraph 40:

> In short, while the hearsay evidence contained in medical documents reasonably may be considered to carry little to no weight, decision makers cannot be said to have discounted medical or health-related diagnoses reasonably where they are based on the doctor's or other health care provider's own expertise.

[35] The Respondent maintains that this Court has recognized that it is improper to rely on a report based on one assessment where the sole treatment recommended is that the applicant remain in Canada in order to usurp an officer's assessment (*Chehade v Canada (Citizenship and Immigration),* 2017 FC 293 ("*Chehade*") at para 15; *Esahak-Shammas v Canada (Citizenship and Immigration),* 2018 FC 461 ("*Esahak-Shammas*") at para 33). The Respondent argues that there is also no indication that the Applicant's prior diagnosis or prescriptions were provided as evidence before the Officer, and that this Court may only review evidence that was before the decision-maker (*Bodine v Canada (Citizenship and Immigration),* 2008 FC 848 at para 12).

[36] The Respondent asserts that the Officer did not ignore the psychological report and provided a clear and reasoned explanation for assigning it little weight (*Meniuk v Canada (Citizenship and Immigration),* 2021 FC 1374 at para 30). The Respondent relies on *Egwuonwu v Canada (Citizenship and Immigration),* 2020 FC 231 ("*Egwuonwu*") to submit that the weight given to the psychological report is for the Officer to determine, not the Court, and that it is not an error to attribute low weight to a report that was written following one visit and based on the accounts provided by the applicants (at paras 74-75).

[37] I find the cases relied on by the Respondent to be distinguishable. In *Egwuonwu,* the reports at-issue were based on accounts that were found to not be credible and no follow-up treatment was noted in the reports (at para 75). In *Chehade,* the applicant argued that since the

officer was not a trained medical professional, it was not open to him to reach a contrary conclusion to a psychotherapy report, which stated that a removal from Canada would cause a deterioration in the applicant's mental health (para 7). At paragraph 15 of *Chehade*, this Court raised the following concerns with the applicant's argument:

> There is a concern that someone who is: 1) not a psychiatrist or psychologist; 2) only has one appointment with a person; 3) writes about their "clinical impressions" rather than a diagnosis; 4) has no treatment plan or follow-up for the individual; and 5) bases a report specifically drafted for CIC on what they are told by the person should be the definitive answer on whether someone should remain in Canada. The officer must of course consider the report but it is not supportable that to disagree with the clinical impressions or weigh the comments in the report with other factors makes the decision reviewable.

[38] In the Applicant's case, the report was written by a licensed Clinical and Rehabilitation Psychologist who, after a session with the Applicant, diagnosed the Applicant with Major Depressive Disorder and provided the professional opinion that a departure from Canada and return to Dominica "[…] would constitute excessive, damaging, and long-lasting psychological hardship". Unlike in *Chehade* and *Egwuonwu*, the Applicant's psychologist also recommended that the Applicant be evaluated for a regimen of anti-depressant medication, and shared this recommendation with the Applicant's general practitioner. This is not a case where the sole treatment recommended is that the Applicant remain in Canada, as the Respondent asserts.

[39] Furthermore, in *Esahak-Shammas*, this Court raised concerns about the practice of submitting psychological reports "generated on the basis of one brief meeting, often on the eve of an immigration proceeding, and in the absence of any prior documented history of mental

health concerns" (at para 33). As the Applicant notes and I agree, *Esahak-Shammas* is distinguishable from this case because the psychologist's December 2019 diagnosis of Major Depressive Disorder confirms the Applicant's previous diagnosis in November 2016, as outlined in her sworn affidavit. While the 2019 psychological report was in fact obtained in the context of the H&C application, it does not exist in a vacuum and is supported by other evidence on the record. I find that the Officer's reasons are dismissive of the evidence indicating that the Applicant has had mental health struggles for many years related to the abuse she has experienced. For instance, the Applicant's mother's affidavit corroborates the Applicant's account of being sexually abused by her male neighbours on numerous occasions when she was a minor, and a support letter from the outreach counsellor at the shelter where the Applicant resided in 2016 confirms that the Applicant accessed counseling services through the shelter.

[40] Overall, I find that the Officer conducted a flawed BIOC assessment by failing to consider Nathan's Anxiety Disorder diagnosis and the impacts of removal on his mental health, and unreasonably diminished the impacts of removal on the Applicant's own mental health (*Vavilov* at para 126). I do not find that the Officer reviewed the Applicant's circumstances as a whole through the flexible and compassionate approach advanced in *Kanthasamy*.

V. **Conclusion**

[41] Based on the above analysis, I find the Officer's decision to be unreasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6410-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different officer.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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