Federal Court Cour fédérale

Date: 20220323

Docket: IMM-2579-20

Citation: 2022 FC 398

Ottawa, Ontario, March 23, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

SYED, ATHAR HUSSAIN SYED
ATHAR, AZHAR SALEH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicants, Mr. Athar Hussein Syed Syed and Ms. Azhar Saleha Athar, seek judicial review of a decision rendered by a Senior Immigration Officer [Officer] of Immigration, Refugees and Citizenship of Canada rendered May 12, 2020 refusing their application for

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

[2] The Applicants are a married couple and over the age of 80 years old. They are citizens of Pakistan. They have two daughters who were born and raised in Pakistan. Their daughters moved to Canada, specifically Ontario and Saskatchewan, when they married. Both the Applicants' daughters and grandchildren are Canadian citizens. In addition to the Applicants' daughters and grandchildren, other members of their family live in Canada, notably Mr. Syed's sister and Ms. Athar's brother and his sister. At the time the H&C application was submitted, Ms. Athar's six other siblings were living in Karachi, Islamabad, Hyderabad, Hong Kong, and California.

[3] Mr. Syed and Ms. Athar retired in 2017 and 2016 respectively. Both spouses completed higher education in Pakistan. Prior to his retirement, Mr. Syed was employed as a GM Accountant at Atlantis Chemical Industries, a post he had held since 2002. Ms. Athar holds a Master's degree in social work, and was the Assistant Director of Social Welfare for the provincial government of Sindh in Pakistan from 1972 through 1995. Following that, Ms. Athar held numerous posts, including as a chairperson at the Network for Women's Rights in Karachi from 2006 through 2016.

[4] In 2012 and 2014, the Applicants were issued visas to visit Canada. On January 19, 2017, the Applicants obtained parent and grandparent super visas, meaning the visas are multiple-entry extended stay visas which permit holders to visit family for up to several years at a time without

the need to renew their status. The Applicants' super visas are valid until September 27, 2026. The Applicants entered Canada on May 15, 2017, where they have remained until the present day.

[5] On January 24, 2018, the Applicants filed an application for permanent residence on H&C grounds seeking to be relieved of the requirement that they apply for permanent residence from outside Canada. The H&C considerations in the application included the Applicants' ages, their relationships with their children and grandchildren, their lack of family and financial support in Pakistan, and the hardship they would face should they need to apply for permanent residence from outside Canada.

[6] The H&C application was refused on May 12, 2020 [Decision].

[7] The Applicants submit that the Decision is unreasonable on the basis that the Officer (a) erred in his assessment of hardship by failing to be empathetic and compassionate to the circumstances of the Applicants, and acting contrary to the objective of family reunification as set out in paragraph 3(1)(d) IRPA; (b) erred in his assessment of establishment by ignoring critical evidence, engaging in speculation, and failing to focus on the disproportionate hardship; and (c) was not sufficiently alive, alert and sensitive to the grandchildren's interests.

[8] The Respondent submits that the Officer reasonably found that there was insufficient evidence to warrant an H&C exemption in the circumstances, having given due consideration to the Applicants' (i) establishment in Canada, (ii) ties to Canada, (iii) consequences of separation

from relatives, and (iv) the best interest of the child, among other things. In the Respondent's view, the Applicants' submissions amount to an impermissible request to this Court to re-weigh the evidence.

II. Preliminary Issue – New Evidence

[9] In their H&C application, the Applicants did not list, either in the body of the application nor in their counsel's submissions, the names of their grandchildren, their dates of birth, where they reside, or provide other information save for the following taken from counsel's submissions:

> The most important is their grandchildren and all of them are very close to their grandparents. Shazia Shareef has 3 children of ages between 19 years and 11 years and the other daughter has 2 children ages between 23 years and 21 years. We are enclosing the photographs of the family for your reference.

[10] A number of the copies of the photographs included hand written names indicating the people in the photographs, some of which were those of grandchildren.

[11] As will be discussed in greater detail further below, in the Decision, the Officer remarked on the lack of information provided about the grandchildren in the application.

[12] On judicial review, the Applicants submitted an affidavit by Mr. Syed attaching further information concerning the relationship with, and the identity documentation of, his grandchildren. The affidavit also sought to adduce evidence in response to other topics addressed

by the Officer, such as the Applicants' health issues, and physical and emotional challenges. The health documentation attached is dated 2012, 2015 and 2016.

[13] The general rule is that the evidentiary record before this Court on judicial review of an administrative decision is restricted to the evidentiary record that was before the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]; *Heredia v Canada (Citizenship and Immigration)*, 2022 FC 25 at paras 12-14). While there are exceptions to the general rule (*Access Copyright* at para 20), I do not find that they apply to the present matter.

[14] In addition, Mr. Syed's affidavit contains argumentation and efforts to draw legal conclusions. This is not an acceptable use of an affidavit on judicial review.

[15] I am satisfied that Mr. Syed's affidavit and the new evidence submitted by the Applicants is not admissible on judicial review. I informed counsel during the hearing that I will not be considering the contents of the affidavit and the associated exhibits, and will restrict myself to the evidence that was before the Officer.

III. Issue and Standard of Review

[16] It is common ground between the parties that the standard of review in the present matter is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The sole issue is whether the Decision was reasonable.

[17] A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). *Vavilov* instructs that the reviewing court must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived (*Vavilov* at para 102, citing *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 55).

[18] It is the Applicants, the parties challenging the Decision, who bear the onus of demonstrating that the Decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[19] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).

IV. Analysis

[20] An exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Fatt Kok v Canada*, 2011 FC 741 at para 7; *Huang v Canada (Citizenship and*

Immigration), 2019 FC 265 at paras 19-20). Subsection 25(1) of the IRPA confers broad discretion on the Minister to exempt foreign nationals from the ordinary requirements of that statute and to grant permanent resident status to an applicant in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. The H&C discretion is a flexible and responsive exception that provides equitable relief, namely to mitigate the rigidity of the law in an appropriate case (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at paras 13-14 [*Rainholz*]).

[21] H&C considerations are facts, established by evidence, that would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another provided these misfortunes warrant the granting of special relief from the otherwise applicable provisions of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 909 at paras 13 and 21 [*Kanthasamy*]). As noted by my colleague Justice Little, "subsection 25(1) has been interpreted to require that the officer assess the hardship that the applicant(s) will experience on leaving Canada. Although not used in the statute itself, appellate case law has confirmed that the words 'unusual', 'undeserved' and 'disproportionate' describe the hardship contemplated by the provision that will give rise to an exemption" (*Rainholz* at para 15).

[22] Subsection 25(1) also refers to the need to take into account the best interests of a child [BIOC] directly affected. In considering the BIOC, an officer must be "alert, alive, and sensitive" to those interests (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75). Relevant considerations include the child's age and level of dependency; the degree of the child's establishment in Canada; the child's links to the country in relation to which the

H&C assessment is being considered; the impacts on the child's education; medical or special needs considerations; gender-based considerations; and the conditions of that country and the potential impacts on the child (*Kanthasamy* at para 40).

[23] It is important to note that an H&C applicant bears the onus of establishing that an H&C exemption is warranted. Where there is a lack of evidence or a failure to adduce relevant information in support of such an application, this is at the peril of the applicant (*Rainholz* at para 18).

[24] In the matter at hand, the Officer concluded that, based on the documentary evidence before him, he did not find that the Applicants had established that sufficient H&C factors existed to warrant an exemption under subsection 25(1) of the IRPA. The Respondent pleads that minimal evidence had in fact been adduced, and that the Officer clearly and reasonably considered all of that evidence.

[25] The Applicants argue that the Officer failed to undertake a realistic hardship analysis and failed to take into account the extent to which the Applicants would be traumatized upon their forced return to Pakistan and ignored their fragile, emotional and physiological state as well as the best interests of the grandchildren. The Applicants submit that the Officer made speculative findings that the parents, the Applicants' children, can continue to be the primary caregivers of the grandchildren.

[26] Despite the able submissions of counsel for the Applicants, I agree with the Respondent. The difficulty facing the Applicants in the present matter is that the Officer cannot be faulted for the lack of evidence before him. The Applicants' daughters reside in Ontario and Saskatchewan. While it may be that the Applicants care for one or more of the grandchildren, there actually is no evidence to this effect in the record. Of the Applicants' grandchildren, only one of them is a minor. In his application, Mr. Syed stated that "we are very attached to our grandchildren and they rely upon me and me wife for guidance and emotional support". Counsel's submissions in 2018, quoted above at paragraph 9 of this judgment, state that the Applicants and their grandchildren are "very close". Beyond that, there is no further evidence of the relationship or dependency. Based on the record, it was open to the Officer to find as follows: "lacking evidence to the contrary I find it reasonable to assume that the applicants' grandchildren have been in the primary care of their parents since birth".

[27] The Applicants submit that the Officer erred in his BIOC analysis. I disagree. Despite having very little information about the grandchildren and noting that submissions had not been put forth in support of the BIOC, the Officer nevertheless considered the best interests of the grandchildren. The Officer noted that the Applicants have not articulated in their submissions or in other documentary evidence the manner in which their grandchildren may be affected by their grandparents' return to Pakistan. The Officer acknowledged that there may be challenges with a departure of the grandparents but absent evidence to the contrary, the Officer reasonably assumed that the grandchildren would continue to receive the love, care and support of their parents in Canada and have access to healthcare and an education.

[28] I find the reasoning of my colleague Justice Roussel in *Khan v Canada (Citizenship and Immigration)*, 2020 FC 202 to be applicable to the matter at hand:

> [18] The Officer's reasons reflect the submissions and the evidence before her. The Officer acknowledged that the Applicant has six (6) grandchildren. She accepted that he plays a role in their lives and that bonds have developed between them. She also accepted that they were learning moral values, culture and language from the Applicant. She explicitly recognized that the presence of a grandparent contributes positively to the growth and development of a child. However, she indicated, with reason, that other than their ages, she had little information about the children. Although the Applicant indicates that he spends a lot of time with his grandchildren by taking them to the park, reading them stories and teaching them moral and cultural values, there is no other information or evidence in the record to put these statements into context and illustrate the extent of the Applicant's involvement with his grandchildren. It was open to the Officer to find that the relationship between the Applicant and his grandchildren could not be characterized as one of interdependency or reliance to such an extent that separation would significantly impact the children's best interests.

[29] I find that the Officer's reasoning reflected the submissions and evidence before him. Contrary to the Applicants' submission, it was not unreasonable for the Officer to assume, absent evidence to the contrary, that the grandchildren's parents will continue to be able to care for their children, only one of whom is a minor, or that the interdependency with the grandparents was not such that an exemption under subsection 25(1) of the IRPA was warranted.

[30] The Applicants rely on *Chamas v Canada (Citizenship and Immigration)*, 2021 FC 1352 [*Chamas*], for the proposition that the Court has recognized the important role played by grandparents. I find *Chamas* to be distinguishable from the matter at hand. In *Chamas*, the female grandparent helped to provide day-today care for her 3-year-old granddaughter, some of which her mother was unable to provide due to physical injuries. The evidence on the record in

Chamas also detailed the daily care and support provided to the grandchild, along with the activities carried out by the grandparent (para 41). My colleague Justice Go, in *Chamas*, noted the critical care provided by the grandparent that required her physical presence in Canada (para 43). No such evidence was submitted in the present case.

[31] As in *Kaur v Canada (Citizenship and Immigration)*, 2021 FC 1242, referenced by the Respondent, here the Officer reasonably found that there was insufficient evidence that the best interests of the grandchildren would be unacceptably compromised by the physical absence of the Applicants (paras 24-25).

[32] The Applicants rely on the following paragraph in *Vavilov* in support of their argument that the Court may take judicial notice (or the Officer ought to have taken notice) of the fact that grandparents, and thus the Applicants, play an important role in their grandchildren's lives:

> [106]….in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely…the evidence before the decision maker and facts of which the decision maker may take notice…. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached. [Emphasis added]

[33] While it certainly may be that many grandparents play important roles in the lives of their grandchildren, it is by no means certain that all grandparents do. I disagree with the Applicants that the Court may take judicial notice of the role that grandparents play in the lives of their grandchildren, nor do I find the Officer ought to have taken notice of such a role.

[34] The Applicants also rely on paragraph 106 of *Vavilov* in support of their argument that the Court may take judicial notice of the fact that the Applicants' ages, in their early 80s, prevents them from doing day-to-day physical tasks. The Applicants submit that they "are even sometimes, unable to move on their own independently", are dependant, and are akin to children, requiring care.

[35] I find that it is not appropriate for the Court to take judicial notice of the Applicants' alleged physical infirmities. Moreover, the record states otherwise. The Applicants declared in their application that they had no serious disease or physical or mental disorder. Their application, including counsel's submissions, speaks to "emotional, moral and financial support" provided by the Applicants' family in Canada, and their relying on them for their "financial and emotional needs". The application states that if the Applicants left Canada, the entire family would suffer "emotional and psychological hardship". The application further states that they rely on their family for "day-to-day moral and financial support". There is no mention in the record of physical difficulties or medical conditions.

[36] The Officer noted that "[w]hile not determinative, the applicants' family members have not put forth for consideration letters of support or other documentary evidence attesting to the relationships the applicants maintain with their family members in Canada." The Applicants plead that letters of support do not come from family, rather it is third parties or individuals outside the family who provide letters of support. I disagree with the Applicants. While evidence from the Applicants' family is not required, there are numerous cases where family members do submit evidence. Ultimately, the burden rests with the Applicants to establish that an H&C

exemption is warranted. As noted above, where there is a lack of evidence or a failure to adduce relevant information in support of such an application, as in the present case, this is at the peril of the Applicants (*Rainholz* at para 18).

[37] The Applicants submit that it would not be in line with the religion to which they and their children adhere, for their children to be "totally deprived and devastated of such opportunity to please his God by serving their cherished parents at this vulnerable stage in their last days and meet their desire to stay and die in their arms." The Applicants devoted time during the hearing to religious and cultural views of the Applicants, which was tied in to their submissions that the Officer ought to have been compassionate and empathetic in his approach. There was, however, no evidence before the Officer or even a mention in the application, as to the religion to which the Applicants adhere and/or any relevant cultural practices. I am therefore not convinced that the Officer erred in this regard.

[38] The Applicants submit that the Officer erred by noting that the Applicants have the option to visit with their family members as their super visas are valid until 2026. The Applicant relies on *Bernabe v Canada (Citizenship and Immigration)*, 2022 FC 295 [*Bernabe*], for the proposition that it was an error for the Office to take into account an alternative immigration stream. I find *Bernabe* distinguishable from the matter at hand. In *Bernabe*, my colleague Justice Sadrehashemi found that it was unreasonable for the Officer to factor in other immigration options (parental sponsorship and visitor visa) where the family did not in fact qualify for those programs (paras 27-29). In the present case, the Applicants have in fact secured the super visas to which the Officer referred.

[39] Finally, the Applicants submit that the Officer erred when he stated that the Applicants "have a network of family support in Pakistan and these family members may assist them in re-establishing themselves in Pakistan if only emotionally" (Emphasis added). The Applicants argue that this is contradicted by the record. The Respondent argues that this statement aligns with the record and it is not a reviewable error. I agree with the Respondent. The record before the Officer, in particular the basis of claim form and counsel's submissions, does refer to several family members living in Pakistan. Moreover, while there is evidence on the record from the Applicants' siblings, in the form of letters, that are "not in a position to … take care of [the Applicants'] financial requirements" or are "financially unable" to provide for them, there is nothing in those letters that speak to their family members' inability or unwillingness to provide them with emotional support. I am not persuaded that this statement by the Officer is a shortcoming sufficient to warrant this Court's intervention.

V. Conclusion

[40] For the foregoing reasons, this application for judicial review is dismissed. The Applicants have failed to demonstrate the Decision was unreasonable. Neither party proposes a question of general importance, and none arises.

JUDGMENT in file IMM-2579-20

THIS COURT'S JUDGMENT is that :

1. The application for judicial review is dismissed;

2. There is no question for certification arising.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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