Federal Court  Cour fédérale

Date: 20220329

Docket: IMM-1896-21

Citation: 2022 FC 427

Ottawa, Ontario, March 29, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

THI NGOC MAI LE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of a Senior Immigration Officer [Officer] refusing the Applicant's application for permanent residence. The application was based on humanitarian and compassionate [H&C] grounds pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, the application is dismissed.

Background

[3] The Applicant is a 57-year-old citizen of Vietnam. She is also a widow and her only daughter lives in Canada with her husband and their 7- and 4-year-old children. Since arriving in Canada in 2013, the Applicant has resided with her daughter's family.

[4] The Applicant was issued a super visa valid to November 22, 2022 that would have allowed her to continue to reside in Canada and to renew her super visa upon its expiry. However, for reasons that are not explained, she failed to renew her visitor record and, therefore, has been living in Canada without status since 2013.

[5] The Applicant submitted an application for permanent residence on H&C grounds on August 1, 2019. She submitted that she is well established in Canada, that it is in the best interests of her grandchildren that she remain here and, that she would suffer hardship if she were required to return to Vietnam.

[6] The Officer denied her application on March 5, 2021.

Decision under review

[7] The Officer considered the Applicant's evidence pertaining to her volunteer work and friends in Canada as well as her ties to her daughter and her daughter's family and gave these relationships positive consideration when assessing the Applicant's establishment in Canada.

[8] The Officer then addressed hardship. As to the Applicant's ties to Canada, the Officer found that there was insufficient evidence to support that any of the Applicant's relationships in Canada are characterized by a degree of interdependency to the extent that, if separation were to occur, it would amount to significant challenges for her, her family, friends or the local community. And, while the evidence from the Applicant's family members in Vietnam indicated they are busy, they did not indicate that they could not visit the Applicant to provide emotional support on occasion. As to the Applicant's submission that she would be destined to poverty if she returned to Vietnam, the Officer found that her current financial assets are largely unknown, other than that she receives income from renting her house in Vietnam. However, her submitted documents show multiple examples of the Applicant having wealth. The Officer found that on a balance of probabilities the Applicant has the financial resources to support herself, regardless of the outcome of her H&C application, and that this would significantly reduce hardship associated with her return to Vietnam. With respect to discrimination, the Officer accepted that women and elderly people can experience discrimination in Vietnam. However, the Applicant was required to link the generalized country conditions to her personal situation. Based on the submitted documentation, there was little to suggest that the Applicant had personally experienced gender- or age-based discrimination in the past and her financial assets would mitigate her need to find employment, at least on a temporary basis. The Officer concluded that the Applicant had not established that she will personally experience discrimination and, therefore, that this factor will not create more than minimal hardship.

[9] Finally, as to the best interests of the child, the Officer accepted that the children love and have a close relationship with their grandmother and that they benefitted from her care.

However, the Officer was not satisfied that the Applicant was the only person who could provide such care. Nor was there evidence that the children have any health issues requiring her presence. The Officer found that the children's best interests will not be significantly negatively impacted by the Applicant's return to Vietnam.

Issues and standard of review

[10] The matters raised by the Applicant all fall within the overarching question of whether the Officer's decision was reasonable. More specifically, the issues are whether the Officer erred in their analysis of:

i. the best interests of the child, and
ii. hardship.

[11] The parties submit and I agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 and 25). On judicial review, the Court "asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Best interests of the child

Applicant's position

[12] The Applicant submits that the Officer singularly focused on the absence of psychological and medical reports rather than analysing the evidence that was provided by the

Applicant in support of the emotional bond between her and her grandchildren. The Applicant also submits that the Officer's best interest of the child analysis is unreasonable because the Officer did not give that factor substantial weight and because the Officer analyzed the children's best interests through a hardship-centric and basic needs approach.

Respondent's position

[13] The Respondent submits that the Officer noted the Applicant's submissions but found that there was no objective evidence that the children's picky eating or refusing to go to bed on time had a medical underpinning. The Respondent submits that the Applicant is requesting the Court to reweigh evidence.

Analysis

[14] Section 25(1) of the IRPA is an exceptional and discretionary remedy. It affords foreign nationals who apply for permanent residence from within Canada who are inadmissible, or who do not meet the requirements of the IRPA, to have their circumstances examined and permanent residence, or an exception from any applicable criteria or obligation of the IRPA, granted if the Minister is of the opinion that it is justified on H&C considerations relating to that foreign national, taking into account the best interests of a child directly affected. That is, on the basis of hardship, such a person is relieved from having to leave Canada to apply for permanent residence through the normal channels. Such an exemption is not an alternative immigration stream or an appeal mechanism for failed asylum seekers or permanent residents, but "acts as a sort of safety valve available for exceptional cases". The applicant has the onus of establishing that an H&C

exemption is warranted (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 [*Semana*] at para 15-16; *Gregory v Canada (Citizenship and Immigration)*, 2022 FC 277 at paras 28-31).

[15] With respect to the best interests of a child directly affected, in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], the Supreme Court of Canada stated that the best interests principle is highly contextual because of the multitude of factors that may impinge on the child's best interests. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs, and maturity. The decision maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive, and sensitive to them (*Kanthasamy* at para 38, referencing *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74–75 [*Baker*]).

[16] A decision under s 25(1) of the IRPA will be unreasonable if the interests of children affected by the decision are not sufficiently considered. This means that decision makers must do more than simply state that the interests of a child have been taken into account, those interests must be well identified and defined, and examined with a great deal of attention in light of all the evidence (*Kanthasamy* at paras 23–25, 35, 38 and 41).

[17] Accordingly, here the Officer was required to be alert, alive and sensitive to the best interests of the children, afford these interests significant consideration, examine them with care and attention in light of all of the evidence, and to take into account the children's personal circumstances (*Kanthasamy* at paras 19-22; *Motrichko v Canada (Citizenship and*

Immigration), 2017 FC 516 [*Motrichko*]). That said, the best interests of the child are not necessarily a determinative factor in an H&C assessment (*Baker* at para 75; *Motrichko* at para 21).

[18] This Court has recognized the important role that grandparents may play in the care of their grandchildren, especially in cases where the children's parents may not be able to care for them or where the children have additional needs (*Chamas v Canada (Citizenship and Immigration)*, 2021 FC 1352 [*Chamas*] at para 38, referring to *Kwon v Canada (Citizenship and Immigration)*, 2012 FC 50 [*Kwon*]; *Fernandes v Canada (Citizenship and Immigration)*, 2021 FC 997 [*Fernandes*]).

[19] Here, the Officer accepted that there was a close emotional bond between the Applicant and her grandchildren. The Officer acknowledged that the submitted evidence established that the Applicant picks up the children from school and helps with their homework, has had a positive impact on them emotionally and socially, and that the Applicant is a mentor and source of guidance to the children. The Officer acknowledged a letter from the eldest child expressing his love for his grandmother. The Officer also acknowledged the Applicant's evidence that the children are picky eaters and that their parents cannot make food the way that the children like, only the Applicant can, as well as her assertion that if she is not around the children will not go to sleep on time and will suffer from insomnia. Having considered the evidence, the Officer acknowledged that the children's relationship with the Applicant would be negatively impacted by the lack of her physical presence in their lives. However, the Officer also contextualized this by noting that if the Applicant were to return to Vietnam the children would still have contact

with her, they would eat other food, they would likely have an alternate caretaker, their parents are able to provide for them emotionally and financially, and they would have access to Canada's education system and health care systems. Thus, although the children's interests would be negatively impacted, they would not be significantly negatively impacted.

[20] Considering the reasons in whole and based on the evidence that was before the Officer, I am satisfied that the Officer addressed the question of "how the children would be impacted, both practically and emotionally, by the departure of the Applicant" (*Motrichko* at para 27) and did not err in the best interests analysis.

[21] The Applicant submits that the Officer unreasonably required psychological reports that would speak to the psychological impact on the children of the Applicant's departure. I do not agree that the Officer required this evidence, or that the Officer unreasonably dismissed the evidence submitted by the Applicant in favour of this purportedly desired evidence. The Applicant's affidavit states that if she were not around the children would not go to sleep on time and will "suffer from insomnia", and that they are picky eaters who would only eat the Applicant's cooking. The Officer noted that there was no objective medical evidence to support that the children had any medical issue preventing them from sleeping nor was there any psychological analysis of the children showing that they have mental health issues that would require the Applicant's continued presence.

[22] In other words, this is not a situation where there was a high level of dependence on a grandparent stemming from the documented special needs of the grandchild. And, unlike

Motrichko, *Chamas*, and *Fernandes*, there is no evidence in this case that the children's parents may not be able to care for them, or that the children had additional needs that were not met by their parents.

[23] Rather, the Officer's reference to the lack of medical and psychological evidence was directed at the general nature of the Applicants' submissions, which did not sufficiently support that the children's physical or psychological well being would be significantly impacted upon the Applicant's departure.

[24] In that regard I note that in her affidavit, the Applicant states that she provided care to the children to allow her daughter and son-in-law to "focus on growing the business and becoming successful". Neither her daughter's letter nor that of her spouse make any reference to the children suffering from any medical or other psychological difficulties; both emphasize only that the Applicant loves and cares for the children. Their father states that if the Applicant leaves "I am afraid it will affect their learning and development", with no further explanation. The Officer references the letter from the principal of the children's school which states that the Applicant helps with homework and school pick-ups and drop-offs. Further, that the Applicant has had a positive impact on the children academically and socially and that their wellbeing is improved by getting to bed earlier which has "helped them focus and adapt to their daily lives and helped build a very strong foundation for theses kids". The principal states her belief that the Applicant's constant presence is important for the children and the rest of the family. The Officer notes that the principal did not indicate that the Applicant's care was the only suitable option for

the children to improve their academic performance. I note that the principal did not suggest that the children have any special needs requiring the Applicant's support.

[25] The Applicant also submits that the Officer failed to focus on the "psychological evidence" that was adduced. I would first point out that this is not evidence specific to the Applicant's grandchildren. Rather, what was submitted were three published journal reports: *Relationships with Grandparents and the Emotional Well-Being of Late Adolescent and Young Adult Grand Children*; *Adolescence and Well-Being*; and *Development potential in the first 5 years for children in developing countries*.

[26] The Officer referred to the submitted reports and found that although they show that children benefit from the presence of a grandparent, there was no psychological analysis of the Applicant's grandchildren showing that they have a mental health issue requiring the Applicant's presence. That is, while most children would likely benefit from having their grandparents provide additional care for them, this is not evidence that most children will suffer significant mental duress when that is not the case. The Officer pointed out that there is no psychological evidence suggesting that the Applicant's grandchildren would suffer psychological harm should the Applicant return to Vietnam.

[27] I have a real concern with the trend of pulling what sometimes appears to be almost random psychological reports off the web, extracting decontextualized statements from them and submitting that this supports claims of hardship. In this matter, for example, the children are ages 4 and 7. They are not adolescents nor do they live in a developing country, but that is what the

submitted reports concern. Further, the Applicant points to the statement in one of the reports where the authors found that “cohesion with grandparents reduced depressive symptoms for grandchildren who were on better terms with their parents”. However, there was no evidence before the Officer that the children were experiencing depressive symptoms. When appearing before me, counsel for the Applicant submitted that while the children are not adolescents, they will be in the future and they might then suffer depressive symptoms. This is pure speculation. I find no error in the Officer’s treatment of these reports.

[28] Nor do I agree with the Applicant that the Officer failed to give sufficient weight to the documentary evidence she submitted. For example, the letter from the Applicant’s grandson states that the Applicant helps him with his bad breams. The Applicant submits that this establishes that the Applicant’s presence is essential to her grandson’s psychological well-being and should have been weighed as such by the Officer. In my view, helping with bad dreams is the stuff of normal childcare and the Officer clearly acknowledged that the Applicant loves and cares for her grandchildren. I do not agree that the grandson’s letter establishes more and that the Officer failed to appreciate this. Nor is this a circumstance where the decision maker focused exclusively on evidence that was not submitted, failed to perform a meaningful analysis or dismissed evidence on the basis that other evidence would have been more desirable, as the Applicant submits, referencing jurisprudence such as *Kim v Canada (Citizehship and Immigration)*, 2020 FC 581.

[29] The Applicant also submits that the Officer erred by conducting a hardship-centric and basic needs-centered, best interests of the child analysis. I do not agree. This is not a case such as

Sebbe, relied upon by the Applicant, where the officer stated that there was insufficient evidence before them to indicate that the basic amenities of the child would not be met in the country to which they were being removed. Nor is it a circumstance like *Etienne*, also relied upon by the Applicant, where the officer incorrectly elevated the test for the best interest of the child by requiring that their health and well-being be severely compromised upon return to their country of origin. While I would agree that the Officer's reference to continued access to education and health care in Canada appears somewhat out of place, a basic needs assessment was not the basis for the Officer's best interest of the child determination.

[30] Rather, as stated by Justice Gascon in *Semana* (at para 34): "What counts and needs to be taken into consideration is the level of dependency between the child and the applicant claiming reliance on a BIOC factor in support of its H&C considerations". In this matter, the Applicant's evidence established that she provides love and care to her grandchildren. However, in my view, the Officer reasonably found that the Applicant failed to establish a level of dependency such that the children's best interests would be significantly negatively impacted if the Applicant returns to Vietnam.

Hardship

[31] The Applicant submits that the Officer unreasonably required her to demonstrate prior discrimination on the basis of her age and gender in order for the Officer to be satisfied that the issue of discrimination merited relief.

[32] The Respondent submits that the onus is on an applicant to show that they would personally be affected by adverse country conditions.

Analysis

[33] The Officer accepted that women and elderly people in Vietnam can experience discrimination, that the documentation shows that women have more difficulty procuring meaningful employment and, that women over the age of 35 account for 50% of unemployment in Vietnam. The Officer noted, however, that in her H&C application the Applicant must link the generalized conditions of her country of return to her personal situation. The Officer states that while the Applicant is an older woman, not all women's experiences are the same. Discrimination is influenced by other things such things as socio-economic circumstances. Based on the submitted documentation, the Officer found that there was little to suggest that the Applicant has personally experienced gender-based or age-based discrimination in the past. She resided in Vietnam most of her life, operated a successful business and has financial assets which will mitigate the need to find employment, at least on a temporary basis. The Officer concluded that the Applicant had not established that she will personally experience discrimination and, as a result, that this factor would not create more than minimal hardship.

[34] In *Kanthasamy* the Supreme Court held that discrimination can be inferred where an applicant shows that are a member of a group that is discriminated against (at para 53) and that the officer in that case erred in requiring the applicant to present direct evidence that he would

face a risk of discrimination if deported. The Supreme Court referred to the Ministerial Guidelines then in effect, and held that:

> [56] As these passages suggest, applicants need only show that they would likely be affected by adverse conditions such as discrimination. Evidence of discrimination experienced by others who share the applicant's identity is therefore clearly relevant under s. 25(1), whether or not the applicant has evidence of being personally targeted, and reasonable inferences can be drawn from those experiences. Rennie J. persuasively explained the reasons for permitting reasonable inferences in such circumstances in *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714:
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> > While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular applicant would face on return …. This is not speculation, rather it is a reasoned inference, of a non-speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis .... [para. 12 (CanLII)]

[35] In *Arsu v Canada (Citizenship and Immigration)*, 2020 FC 617 [*Arsu*], Justice McHaffie applied this finding in *Kanthasamy* to an H&C officer's assessment of adverse country conditions and held:

> [16] …..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: *Kanthasamy* at para 56; *Miyir* at para 33. 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: *Kanthasamy* at para 56, citing *Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714 at para 12.** 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.
>
> [17] Read fairly, I do not take the officer to be ignoring the hardship the Arsus may face in Turkey on the basis that others face greater hardship, or requiring them to be "more likely" to face hardship than others. Nor do I read the decision to effectively disregard the hardship because it is also suffered by others in the country, as criticized in *Diabate*. Rather, I read the officer to be assessing the extent and nature of the hardship to which the Arsus may be exposed, giving "considerable weight" to their risk of mistreatment while recognizing they are not at the highest end of the spectrum of dangers described in the country condition evidence. **This type of weighing of the country condition evidence in light of the particular personal circumstances of an applicant is a valid part of an H&C analysis.**
>
> [18] The Arsus also argue that they were not required to establish that they would themselves be personally targeted, given their membership in a group that is subjected to discrimination: *Kanthasamy* at paras 52–56. While I agree with this proposition, I read the officer's decision as having recognized this and conducted the appropriate analysis. The officer stated that although they were not satisfied that the Arsus had been previously targeted, they nevertheless accepted that Kurdish Alevis experience discrimination and acknowledged that pro-Kurdish organisations and protests have been targeted by the state. This analysis, and the assignment of considerable weight to the consequent risk of mistreatment, is in keeping with *Kanthasamy*.
>
> (emphasis added)

[36] Similarly, in *Obodoruku v Canada (Citizenship and Immigration)*, 2022 FC 224 [*Obodoruku*], an H&C officer accepted that gender-based violence and mistreatment were prevalent in the country of removal, and recognized that the applicants were all female. However, utilizing wording that is very similar to the Officer's reasons in the present case, the

officer also stated that they were "cognizant that not all women's experience[s] are the same" and stated that "[g]ender-based hardship is influenced by such things as socio-economic circumstances, location and race/ethnicity, just to name a few" (*Obodoruku* at para 26). Assessing these reasons, Justice Little found that the officer carried out the kind of assessment contemplated by Justice McHaffie in *Arsu* (at para 24), and further held:

> [27] Based on *Diabate*, the applicants challenged the officer's statement that there was "insufficient information to suggest that the applicants are more likely to be targeted than other females in their region of return" in Nigeria. In the context of the officer's overall reasoning on this issue, I find that the officer was considering the hardship that would be experienced by these applicants in Nigeria if they return, with the evidence—particularly Ms Obodoruku's prior successful business experience there. In substance, the officer's assessment is better characterized as a personalized assessment of the applicants' likely hardships on return to Nigeria: *Arsu*, at paras 16-17. I do not believe the officer raised the legal standard required of the applicants, or disregarded or minimized the hardships the applicants may experience because other women also suffer the same circumstances. Although the officer did not give the same weight to the applicants' exposure to adverse country conditions as the officer did in *Arsu*, the weighing of evidence is a matter for the officer.

[37] I agree with the reasoning in *Arsu* and *Obodoruku* (see also: *Su v Canada (Citizenship and Immigration)*, 2022 FC 366 at paras 33-34). In this case, the Officer accepted that women and elderly people can be discriminated against in Vietnam. That is, the Officer accepted that discrimination can be inferred because the Applicant is a member of this group which can be discriminated against. The Officer did not require the Applicant to provide evidence that she would be discriminated against, but undertook an individualized analysis of her circumstances to determine if it was likely that she would be discriminated against resulting in hardship sufficient to warrant H&C relief.

[38] In that regard, the Officer had previously assessed the Applicant's submission that if she returned to Vietnam she would have no source of income and would be destined to poverty. In that regard, the Officer accepted that the Applicant receives rental income from her home in Vietnam but noted that her financial assets were largely unknown. However, the documentation she submitted showed that she values her house in Vietnam at $250,000; she gave her son-in-lawa loan of $10,000; she gave her friend $4000; she donates $1000 annually to the Manjushri temple; and, she sponsors a few Tibetan monks in India by paying for their schooling, clothing, and room and board. The Officer found that these examples show, on a balance of probabilities, that the Applicant has the financial resources to support herself in Vietnam. Nor was there evidence that she could not sell her house for a lower cost option. The Officer found that the Applicant's financial assets will significantly reduce the hardship associated with returning to Vietnam.

[39] The onus was on the Applicant to provide all necessary information to support her H&C claim. In her submissions made in support of her H&C application, she claimed that the intersection of age and gender discrimination would make it impossible for her to find suitable employment and she would therefore be destined to poverty if she were to return to Vietnam. The Officer considered that submission but found that the documentation provided by the Applicant submitted did not support this claim of hardship.

[40] I note that in addition to the documents specified by the Officer, a letter of support submitted by one of the Applicant's brothers states that she would not have any problem with finances in Vietnam and a letter of support from one of her friends in Canada states that the

Applicant generously donates money to various fundraising functions in the community, schools and to many temples. The Applicant points to a letter from another brother who states when their parents became ill the Applicant rented her home and moved into her parents home to care for them. Their parents died but he now lives there to take care of their sister who is disabled and that that the Applicant uses some of her rental income so that he can be a full-time care giver. When appearing before me the Applicant suggested that it could be inferred from this that her income is insufficient to support her in Vietnam. However, the letter does not address this.

[41] Thus, in the context of whether the Applicant would be discriminated against on the basis of her age and gender in the finding of employment, the Officer found that her particular economic circumstances suggested that difficulty in finding employment would not create more than minimal hardship. And while it is true that the Officer did note that there was little to suggest that the Applicant had previously suffered gender- or aged-based discrimination in the past, I do not agree with the Applicant that the Officer treated this as a pre-condition for a finding of future discrimination. The Officer undertook the "meaningful, individualized analysis" that they were required to undertake, contextualizing the Applicant's profile as an elder woman in reference to other personal characteristics and circumstances (*Kanthasamy* at para 56; *Arsu* at para 16; *Obodoruku* at paras 26-27; *Quiros v Canada (Citizenship and Immigration),* 2021 FC 1412 at para 33).

Conclusion

[42] In conclusion, for the reasons above, I find that , the Officer's decision was justified, transparent and intelligible. The Court's intervention is not warranted.

JUDGMENT IN IMM-1896-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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