Federal Court Cour fédérale

Date: 20220413

Docket: IMM-3402-21

Citation: 2022 FC 540

Toronto, Ontario, April 13, 2022

PRESENT: Madam Justice Go

BETWEEN:

KRISHNA JAYANTHI NATESAN
AUROSHIKA JAI GANESH
ASHWIN JAI GANESH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Krishna Jayanthi Natesan, a citizen of India and her two children, Auroshika Jai Ganesh and Ashwin Jai Ganesh [together the Applicants] applied for permanent residence on humanitarian and compassionate grounds [H&C application] pursuant to s. 25(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [*IRPA*]. They seek judicial review of the decision of a Senior Immigration Officer [Officer] to refuse the application [the Decision].

[2] I find the Decision unreasonable as it failed to adequately consider the best interests of the children [BIOC], the psychological evidence, and the risk of gender violence in India. I therefore grant the application.

II. Background

A. *Factual Context*

[3] The principal Applicant, Ms. Natesan, was born and educated in India. She moved to Kuwait with her mother to find a higher paying job in 1995. There, she married her husband, Jai Ganesh M. Kadhrivel, in 2000. They decided to live in Kuwait, as his family disapproved of the marriage because he was of a higher caste, while she came from a caste considered among the lowest in the Indian caste system. Their daughter Auroshika and son Ashwin were born in Kuwait in 2001 and 2002, respectively.

[4] The Applicants moved to India and lived with Mr. Jai Ganesh's parents in 2003 after Iraq launched missile attacks on Kuwait. However, the hostile treatment of Ms. Natesan by her in-laws did not improve, and the family went back to Kuwait about a month later.

[5] As the family was unable to obtain permanent residence in Kuwait, Mr. Jai Ganesh applied for permanent residence in Canada and was accepted in 2008. The family thought they

had until the expiry of their permanent resident cards in 2013 to come to Canada. Ms. Natesan and the children remained with her husband in Kuwait so that he could wind down his business.

[6] Ms. Natesan's sister and brother-in-law also received permanent residence in Canada, and moved here in 2011. The plan was for the two families to move to Canada together.

[7] As Mr. Jai Ganesh's parents had health difficulties in 2010 and 2011, he had to travel back and forth to India to care for them. Eventually, Mr. Jai Ganesh and the Applicants lost their permanent resident status in Canada.

[8] In 2015, Mr. Jai Ganesh attempted to reapply for permanent residence documents but was rejected in October 2016. In December 2016, the family applied for Canadian visas.

[9] In January 2017, at age 41, Mr. Jai Ganesh suffered a sudden and fatal heart attack. The family's visas to Canada were issued the next day. While the children came to stay with her sister's family in Canada, Ms. Natesan closed down her husband's business and eventually joined her children and sister in Guelph in September 2018.

[10] The Applicants submitted their H&C application in April 2019, relying on their close family relationships and establishment in Canada, the best interests of Auroshika and Ashwin (who were at the time minor children), as well as challenges they would face in India including gender-based violence.

B. *Decision Under Review*

[11] In the decision under review, the Officer gave little weight to community ties in Canada, finding that although the children attended school, there was little information about Ms. Natesan's activities in Canada. The Officer gave weight to the Applicants' ties with Ms. Natesan's sister, finding that the two families had a close relationship. The Officer gave little weight to the Applicants' financial situation in Canada, noting Ms. Natesan's education and that she had been financially self sufficient from funds from her husband's business, which could be used to re-establish in India. In considering a psychologist's report stating that Ms. Natesan has major depressive disorder, the Officer accepted that Ms. Natesan has depression but found that the events recounted in the report were "not objective." The Officer also noted that Ms. Natesan had previously accessed virtual counselling and would be able to do so from India.

[12] The Officer gave little weight to the BIOC component as well as country conditions in India with respect to gender-based violence. The Officer concluded that there were insufficient H&C considerations to justify an exemption under s. 25(1) of *IRPA.*

III. Issues and Standard of Review

[13] The Applicants argue that the Officer erred in

a. applying the incorrect test for BIOC;
b. their treatment of the psychological evidence;
c. requiring evidence of personalized harm in assessing hardship based on discrimination; and
d. applying the incorrect test for H&C relief.

[14] The parties agree that the decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[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. The onus is on the Applicants to demonstrate that the decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied 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": *Vavilov*, at para 100.

IV. Analysis

A. *Did the Officer apply the incorrect test for best interests of the children?*

[16] The Officer accepted that it was in the best interests of the children to remain in Canada, noting that they had completed high school in Canada, had good marks, and had spent little time in India. But the Officer also found that there was not enough evidence that the children were so integrated into Canadian society or that returning to India would represent such difficulty to them that their well-being would be compromised, and as such gave little weight to the BIOC component.

[17] The Applicants argue that rather than evaluating what was in the children's best interests and weighing that against the other factors relevant to an H&C application, the Officer

incorrectly elevated the BIOC test by requiring that there be a significant negative impact on the children.

[18] In the Applicants' view, it was unreasonable for the Officer to require that the children suffer to the extent that their well-being be compromised in order for their best interests to be given more than minimal weight, citing *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*] at paras 67-70 in support.

[19] While I agree with the Respondent that there was no requirement to apply the *Williams* test (*Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at para 23), and that an applicant is not entitled to a positive H&C decision simply because the best interests of a child favour that result (*Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at para 58), I find in this case, the Officer has erred in the BIOC analysis because the Officer applied a wrong test for BIOC, and failed to consider all the critical evidence that was relevant to the BIOC analysis.

[20] As the Supreme Court of Canada stated in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 34:

> This brings us to the fact that s. 25(1) refers to the need to take "into account the best interests of a child directly affected". In *Agraira*, LeBel J. noted that these interests include "such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections": para. 41…

[21] And then at para 41:

> In my view, the status of the applicant as a child triggers not only the requirement that the "best interests" be treated as a significant factor in the analysis, it should also influence the manner in which the child's other circumstances are evaluated. And since "[c]hildren will rarely, if ever, be deserving of any hardship", the concept of "unusual and undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: *Hawthorne*, at para. 9. Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief…

[22] Instead of following the instructions from the Supreme Court and focusing on what was in the children's best interests, the Officer asked the wrong question by probing whether there was evidence of difficulty (in other word hardship) that would "compromise" the children's well-being. This approach was rejected by this Court in *Conka v Canada (Minister of Citizenship and Immigration)*, 2014 FC 985 at para 23, quoting a comment from Justice Décary of the Federal Court of Appeal in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9 that "the concept of 'undeserved hardship' is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship."

[23] I also find the Officer failed to give adequate weight to the children's close relationship with their aunt and family in Canada, who helped them grieve the sudden loss of their father and adjust to life without him. This error undercut the adequacy of the BIOC analysis as an officer has to "consider the impact of all the critical evidence on the H&C factors raised by the application and to account for evidence that ran counter to the conclusions reached or that would undermine the premises on which the H&C decision was made: Vavilov at paras 126 and 128": *Wedderburn v Canada (Minister of Citizenship and Immigration)*, 2022 FC 299 at para 37.

[24] As Auroshika wrote in a letter in support of her family's H&C application, her "aunt's family are the closest relatives" they have ever had, their uncle "is like a father figure" while their aunt "is like a second mom", and they have no one as close to her and her brother in India. Auroshika also wrote that her aunt and uncle took her and her younger brother in and cared for them "like their own" to make it easier for their mother when she was in Kuwait. A letter from Ms. Natesan's sister also described how she cared for the two children after the passing of Mr. Jai Ganesh, as Ms. Natesan was "emotionally drained" and suffered from "severe depression" while in Kuwait. In addition, the daughter of Ms. Natesan's sister wrote a letter describing Auroshika and Ashwin as her own siblings and are her emotional support as she is theirs.

[25] In the context of BIOC, the Decision made no mention of the support the two minor Applicants have been receiving from their aunt and uncle since the most tragic event that the children had likely encountered in their lives, i.e. the death of their father. As such, I agree with the Applicants that the Officer minimized the children's interdependent relationship with their aunt's family before concluding it would not be detrimental for the children to leave their closest relatives, whom they view as parental figures and as siblings.

[26] Notwithstanding the evidence before him, the Officer found, unreasonably, that insufficient evidence has been put forth to support that the relationships between the children and their family members in Canada are "characterized by such a degree of interdependency and reliance that removal would be significantly detrimental to the applicants." This finding minimized, discounted and ignored factors favourable to the children, contrary to *Kanthasamy*, at paras 34 and 41.

[27] The Officer also found that the children's travel experience would help them reintegrate into Indian society, that they are fluent in English and Tamil, and that they could stay in touch with their Canadian family from India. In so finding, the Officer failed to meaningfully consider their lack of family support in India, the little time the children have spent in India, and the challenges they would face adapting to life in a country they have never lived in and whose culture they are not familiar with.

[28] At the hearing, the Respondent argued that as the Officer acknowledged that it was in the children's interests to stay in Canada, this finding therefore "works in their favour." This argument is directly contradicted by the Officer's own conclusion stating "I give little weight to the BIOC component."

[29] The Respondent also argued at the hearing that the children are now at university age and could go anywhere they want to study and need not return to India, as well as that they have only been in Canada since 2017. These additional arguments did not comport with the Decision, which made no mention of where the children could pursue further study, or why the number of years they have spent in Canada made it acceptable to discount their best interests.

[30] In conclusion, by applying a wrong legal test, and by failing to engage with the critical evidence, the Officer failed to be "alert, alive and sensitive" to the children's best interests: *Kanthasamy* at para 38 citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74-75. As such, the Decision was unreasonable.

B. *Did the Officer err in their treatment of the psychological evidence?*

[31] With respect to the psychological evidence, the Decision stated, in part, as follow:

> I have reviewed the psychological evaluation of the adult applicant. The assessment consisted of a 60 minute clinical assessment. The assessment was conducted by Gerald Devins, Psychologist. The applicant was referred by her counsel for an independent psychological assessment. A synopsis of the applicant's series of events in Kuwait, India and Canada are presented. The conclusion of the report is that the applicant has major depressive disorder of moderate severity.
>
> While I accept that the applicant has depression, I assign only some value to the assessment's other conclusions without further documentary evidence to support the statements. [emphasis added]

[32] I interpret the above quoted reasons to suggest that the Officer accepted Dr. Devins' diagnosis that Ms. Natesan has "major depressive disorder of moderate severity", but the Officer did not accept other findings in the report dealing with country conditions. I put my interpretation to the parties at the hearing for their response. The Respondent indicated that they agree with my interpretation.

[33] While the Officer accepted that Ms. Natesan suffered from depression, the Officer ultimately "assigned only some value" to the psychological assessment, on two grounds.

[34] First, the Officer found that information in the report concerning the circumstances of Ms. Natesan's life is not objective but rather based on information she provided to the psychologist, noting that there was no indication that the psychologist witnessed events in Kuwait, India or Canada or consulted country condition evidence from India. Second, the Officer found that Ms. Natesan had the knowledge and ability to access online resources should she face

mental health challenges upon returning to India. The Applicants took issue with both of these findings.

[35] With respect to the Officer's first finding regarding the report, the Applicants argue that the Officer unreasonably disregarded the unavoidable reality that mental health professionals are not country condition experts and will only rarely witness the events for which a patient seeks professional assistance. The Applicants also argue that the Officer's reasoning is contrary to *Kanthasamy*'s statement that "a psychologist need not be an expert on country conditions in a particular country to provide expert information about the probable psychological effect of removal from Canada": *Kanthasamy* at para 39.

[36] The Applicants further argue that in requiring the psychologist to have witnessed events or have country condition knowledge, the Officer unreasonably elevated the standard for accepting psychological evidence. The Applicants point out that the facts narrated in the report were also contained in a sworn affidavit that the Officer did not take issue with, that the findings of the report were informed by the administration of a psychological test (the Minnesota Multiphasic Personality Inventory (MMPI) F-PTSD Scale), as well as that the assessing psychologist has a PhD in Clinical Psychology, is a registered psychologist, has conducted more than 6,800 psychological assessments, and had no special interest in the case.

[37] The Respondent replies that it was reasonable for the Officer to not accept the psychologist's findings on country conditions in India and the situation that Ms. Natesan would encounter if she returned there, considering that the psychologist did not indicate that he had

done any research with respect to country conditions in India. In the Respondent's view, the psychologist simply repeated what Ms. Natesan told him about the situation in India without doing any due diligence to ascertain if her perceptions were accurate or acknowledging his ignorance on the issue. The Respondent argues that there is a long line of jurisprudence from this Court establishing that just because a psychologist or psychiatrist repeats what they were told by an applicant does not necessarily make those assertions true (*Demberel v Canada (Citizenship and Immigration)*, 2016 FC 731 [*Demberel*] at paras 47-48).

[38] *Demberel* can be distinguished, in my view, in that the Officer in this case did accept that Ms. Natesan has depression. Having accepted that finding, the Officer then went on to reject the rest of the psychologist's conclusions based solely on the ground that the "information in the report concerning the circumstances of the applicant's life is not objective since it is likely based on information that was provided to him by the applicant." In my view, this finding is unreasonable for two reasons: first, the diagnosis, which the Officer accepted, is based in part also on Ms. Natesan's information, and second, I agree with the Applicants that this finding elevated the standard for accepting psychological evidence, and ran counter to *Kanthasamy*, at para 49.

[39] As to the second finding of the Officer concerning the report, I agree with the Applicants' submission that the Officer erred in ignoring the psychological effect of removal from Canada and focused instead on the availability of treatment in India: *Kanthasamy* at para 48.

[40] The psychological report concluded that Ms. Natesan's mental health would deteriorate with exposure to further harm and it was in her best interest to remain in Canada, based on the trauma that resulted from her husband's unforeseen and untimely death, the minimal benefit she incurred from online mental health treatment in the past, her experience of passive suicidal ideation, and the considerable improvement in her mental health that was achieved through her sister and brother-in-law's support.

[41] The Decision made no mention of these aspects of the psychologist's expert opinion whatsoever, as the Officer simply concluded that Ms. Natesan could access "online resources" for her mental health challenges. In my view, this conclusion was unreasonable because it ignored, and was not responsive to, the Applicants' evidence and submission, including evidence from Ms. Natesan's sister confirming that Ms. Natesan became "emotionally drained and suffered severe depression while she was in Kuwait" and that there was "much positive change" in Ms. Natesan's emotional well being since her arrival in Canada.

[42] I reject the Respondent's additional argument at the hearing that the psychologist's assessment report needs to be "taken in its context" as it was done "only for the purpose of immigration", and "not for helping the Applicant with her mental health challenges."

[43] I find the Respondent's new argument curious to say the least. As the Respondent points out, the onus is placed on an applicant to demonstrate theirs is a case that warrants an exemption. Had the Applicants in this case not filed a psychologist's report, the Officer would likely not even have accepted that Ms. Natesan has depression.

[44] Further, in my view, there is nothing untoward for applicants in H&C cases to put in a psychological report, where applicable, in support of their application. It is no different from applicants who suffer from a physical medical condition submitting a report from their treating physician confirming their ailment. Further, as the Applicants noted, parties in criminal and civil proceedings routinely submit psychological or psychiatric assessments as part of the normal course of the legal process. To question the value of such a report merely because it is done in the context of an immigration proceeding, the Applicants argued, is unreasonable. I agree.

[45] In this particular case, the Officer did not question why Ms. Natesan has gone and sought this psychological report, and the Officer in fact accepted the diagnosis made by the psychologist. There is simply no basis for the Respondent to question the motivation of the Applicants to obtain this report nor is there any evidence to suggest anything nefarious as to how this report came about.

C. *Did the Officer err by requiring evidence of personalized harm in assessing hardship based on discrimination?*

[46] The Officer gave little weight to country conditions in India, finding that although gender-based violence is a problem in India, the Applicants must link country conditions to their personal situation and there was insufficient evidence that the female Applicants would be more likely to be targeted than other women in India.

[47] The Applicants argue that the Officer erred in requiring direct evidence linking the female Applicants to a threat of sexual violence and discrimination in India, stating that they

were not required to show that they would be targeted more than other women in India or to show personalized evidence of discrimination, according to *Kanthasamy*, at paras 55 to 56, and followed in *Isesele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 222 at para 16; *Kanakasingam v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 457 at para 20.

[48] The Respondent argues that irrespective of whether poor general country conditions in one's country of nationality can be the basis of a successful H&C application, the Applicants have failed to tie their personal circumstances to those asserted negative country conditions: *Dorlean v Canada (Citizenship and Immigration)*, 2013 FC 1024 [*Dorlean*] at paras 35-36., In *Dorlean* Justice Shore found that an H&C application must present a particular risk that is personalized to the applicant, otherwise every H&C application submitted by a national from a country with general problems would have to be assessed positively, which is not the purpose of the H&C process.

[49] I note that *Dorlean* was decided pre-*Kanthasamy*. *Kanthasamy* clarified, at para 53, that discrimination can be inferred "where an applicant shows that he or she is a member of a group that is discriminated against."

[50] I further note that the Ms. Natesan did tie her personal situation to the discrimination she would face in India and provided submissions in this regard. In her affidavit, Ms. Natesan conveyed worries about her safety and Auroshika's safety due to "widespread" sexual harassment and violence against women in India. She also talked about particular discrimination she would face "as a widow and as a single woman." It was further noted in the psychologist's

report that Ms. Natesan expressed concerns that "her freedom to express herself and conduct her life freely and independently will be constrained severely" in India "as a widow with two children", noting the significant stigma leading to "ostracism and being shunned", and that these negative effects "will extend to her children."

[51] In the Respondent's view, applying the Applicants' rationale to its logical conclusion would mean that female nationals of India who submit H&C applications (irrespective of their socio-economic status or where they would reside in India) would effectively always have to be approved. I disagree. Certainly gender-based discrimination could well be a factor in many H&C applications submitted by female nationals of India (and of other countries for that matter), but it would still be just one of many factors that need to be assessed in light of the totality of the evidence in each and every case.

[52] Recently, in *Quiros v Canada (Minister of Citizenship and Immigration),* 2021 FC 1412 at para 30, I adopted the reasons of Justice Grammond in *Marafa v Canada (Citizenship and Immigration)* 2018 FC 571 at paras 5-7, which rejected a similar argument made by the Respondent here:

> [6] With respect for my colleagues, I find that this reasoning exaggerates the scope of the dominant line of cases mentioned above and neglects the discretionary nature of a decision on an H&C application. Considering a factor does not necessarily mean that the decision will be favourable to the applicant. Therefore, considering the general conditions in the country of removal does not result in the prohibition of any removal to certain countries where living conditions are particularly difficult.
>
> [7] The reasoning in *Lalane, Joseph* and *Ibabu* is difficult to reconcile with the Supreme Court of Canada's decision in *Kanthasamy*. In fairness to my colleagues, I note that *Kanthasamy* was rendered after their decisions. In that

> decision, the Supreme Court rejected a silo approach to the factors relevant to an H&C application and affirmed that officers must "consider and give weight to all relevant humanitarian and compassionate considerations" (paragraph 33, italics in the original). In reality, refusing to consider the living conditions in the country of removal is tantamount to saying that the applicant is being sent to an imaginary country. Such a detached approach is contrary to the spirit of *Kanthasamy*.

[53] By requiring Ms. Natesan and Auroshika to demonstrate that they are "more likely to be targeted than other women in India", the Officer has erred by imposing a higher burden on the female Applicants that the law does not require.

[54] The Applicants made additional arguments at the hearing that the Officer has erred by ignoring the caste issue, which intersects with the gender based discrimination. I agree with the Respondent that there was insufficient evidence in the record concerning the caste issue, especially with respect to its impact on Auroshika (whose parents came from two different castes). Further, given my finding on the issue of gender based violence, I need not consider this new argument.

D. *Did the Officer err in applying the H&C test?*

[55] The parties in this case also disagree on the legal test for assessing an H&C application. The Respondent argues that it is an "exceptional" measure and not an alternative immigration stream, citing *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15; *Canada (Public Safety and Emergency Preparedness) v Nizami*, 2016 FC 1177 at para 16; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16. The Applicants

submit that the approach urged by the Respondent has been rejected by the majority of the Supreme Court in *Kanthasamy*, paras 13, 31-33.

[56] I note, first of all that, in this case, unlike many H&C decisions, the Officer did not explicitly state that the Applicants had not shown "exceptional" or "extraordinary" circumstances. The parties may have inserted this interpretation when it does not appear in the Decision itself.

[57] To the extent that I have to opine on the different approaches urged by the parties, I find the following quote from Justice Zinn in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 most instructive, after he summarized the essential nature of H&C relief:

> [23] There is a significant difference between observing that this exceptional relief is provided for because the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available only to those who demonstrate the existence of misfortunes or other circumstances that are exceptional relative to others. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there.
>
> [Emphasis in original]

[58] I agree with the Applicants that assessment of H&C applications is not based on a "comparative" approach whereby an applicant is asked to demonstrate why their circumstances, *as compared to others*, would warrant an exemption. As to the Respondent's submission that officers making H&C decisions need "something" to distinguish one case from another given they have thousands of cases to contend with, I say they need look no further than to the majority decision of the Supreme Court in *Kanthasamy*, which confirmed that the exercise of a H&C

discretion is all about offering "equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortune of another": *Kanthasamy*, at para 21. *Kanthasamy* serves as a guidepost to assist officers with their H&C determination by reminding officers the legislative purpose behind s.25(1), and the relevant factors to consider in an H&C assessment. Indeed, I assume that all officers tasked with assessing H&C applications would be familiar with the teachings of *Kanthasamy*.

[59] Ultimately, it is not up to me to decide if this case is one that would so excite that desire within our shared community to grant an exemption. It is my decision, however, that there are more than sufficient errors to warrant sending the matter back for redetermination by a different decision maker.

V. Conclusion

[60] The application for judicial review is allowed and the matter is returned for redetermination by a different officer.

[61] There is no question to certify.

JUDGMENT in IMM-3402-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different officer.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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