Federal Court  Cour fédérale

Date: 20220406

Docket: IMM-1423-21

Citation: 2022 FC 484

Ottawa, Ontario, April 6, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

JOLITTE AMANOUIEL YOUNAN
ALBRON EVEN ADMON ADMON
AND ONEEL YOUSF

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by a Senior Immigration Officer [Officer], dated February 4, 2021, refusing the Applicants' application for permanent residence on humanitarian and compassionate [H&C] grounds [Decision]. It involves a single mother from Syria and her two young sons who hold Iraqi citizenship. The Officer found the Applicants did

not have sufficient H&C considerations to grant an exemption under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Issue and standard of review

[2] At issue is whether the Decision is reasonable.

[3] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

III. Facts and analysis

[4] The Applicants are citizens of Syria and Iraq. The Principal Applicant was born in Syria, but relocated to Iraq to live with her spouse (now "Ex-Spouse"). The Ex-Spouse is not included in the request for H&C. The Principal Applicant and her husband have two minor sons, both citizens of Iraq. Collectively this mother and her two sons are "the Applicants."

[5] The Applicants and the Ex-Spouse lived with the two young boys in Lebanon until 2016, at which point the family was accepted as refugees by the United Nations High Commission for Refugees (UNHCR). They were resettled by UNHCR in the United States in September 2016.

[6] Given the likelihood of a "Muslim Ban" being imposed by a new and different incoming United States [US] administration, the Applicants entered Canada on December 18, 2016 as refugee claimants. Their refugee claim was heard by the Refugee Protection Division [RPD] under an exception to the Safe Third Country Agreement. However, their claim was denied on June 23, 2017, as was an appeal to the Refugee Appeal Division [RAD].

[7] The Applicants submitted an H&C application in April 2018, which was denied.

[8] While they were in Canada, the relationship between the Principal Applicant and her Ex-Spouse broke down.

[9] The mother filed this H&C application for herself and her two sons, excluding the Ex-Spouse, on November 13, 2019.

A. *Is the Decision reasonable?*

[10] The Officer was not satisfied the Applicants' H&C considerations justified an exemption under section 25(1) of *IRPA* and dismissed their application on February 4, 2021. The Officer referred to the Applicants' submissions, noting their resettlement in the US by UNHCR. The Officer's Decision considered the Applicants' hardship, establishment in Canada, adverse country conditions in Syria and Iraq, and the best interests of the children.

[11] In terms of hardship, I note that in *Milad v Canada (Citizenship and Immigration)*, 2019 FC 1409 at paras 36–37, Justice Kane held the existence of an ADR imposed by the Government of Canada is a relevant consideration in the context of the country conditions and the assessment of hardship that may not be ignored, as was the case both in this case and the one before Justice Kane:

> [36] In the present case, the Officer does not acknowledge the updated submissions which, among other information, noted that there was a moratorium on removals to Libya. While the moratorium would not automatically lead to a positive H&C finding, the moratorium is a relevant consideration in the context of the country conditions and the assessment of hardship. The Officer did not even acknowledge that a moratorium was in effect or that Mr. Milad would not be returned due to the moratorium

> (although this is noted in the cover letter which attaches the decision of the Officer).
>
> [37] As guided by *Kanthasamy*, the Officer assessing an H&C application must consider all the evidence presented. In this case, the Officer was required to consider the extensive country condition documents, including the existence of the moratorium on removals, which is relevant to the country conditions and the assessment of the hardship Mr. Milad would face if he could be returned to Libya. The Officer's decision does not convey that all the relevant evidence was considered in assessing the hardship considerations. Moreover, the evidence that the Officer clearly considered and summarized does not appear to have been fully taken into account in assessing the hardship claimed by Mr. Milad.
>
> [Emphasis in original]

[12] I also note the judgment of this Court in *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 [per Norris J] [*Bawazir*] for the proposition that H&C officers must consider the existence of an ADR in an assessment.

[13] In my view, *Bawazir* involves a very similar set of circumstances as here: the Applicant was a national of Yemen, a country also subject to an ADR. The officer in that case applied limited weight to country conditions in the hardship analysis because the ADR prevented the Applicant from being returned immediately, making the conditions "far less relevant to the applicant's personal circumstances."

[14] In granting judicial review, Justice Norris concluded the officer erred in refusing to consider the fact that the Applicant would need to return to the dire conditions of a war zone to apply for permanent residence without a section 25 exemption:

> [17] One can certainly understand why Mr. Bawazir would like to secure his status in Canada by obtaining permanent residence

> here. In my view, a reasonable and fair-minded person would judge the requirement that he leave Canada and go to a war zone where a dire humanitarian crisis prevails so that he could apply for permanent residence as a misfortune potentially deserving of amelioration. The existence of the ADR demonstrates that Canada views the conditions in Yemen as a result of the civil war to "pose a generalized risk to the entire civilian population." The conditions are so dire there that, with a few exceptions, Canada will not remove nationals to that country. Applying the usual requirements of the law in such circumstances clearly engages the equitable underlying purpose of section 25(1) of the *IRPA* (cf. *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 43) yet the officer finds that the conditions prevailing in Yemen and the "extreme hardship" Mr. Bawazir would face there deserve "little weight" in the analysis. This was because Mr. Bawazir is not facing the threat of imminent, involuntary removal. However, the officer did not consider that Mr. Bawazir has no choice but to leave Canada for Yemen if he wishes to apply for permanent residence unless an exception is made for him. The officer erred in effectively dismissing a factor which is clearly relevant to the equitable underlying purpose of section 25(1) of the *IRPA*.
>
> [Emphasis added]

[15] In my view, *Bawazir* applies with the same force in the case at bar because in the case at bar the existence of the ADR was not considered. Adopting what Justice Norris held, the Officer failed to consider the Applicant has no choice but to leave Canada with her two sons for Syria if she wishes to apply for permanent residence unless an exception is made under section 25 or some other relief is available. In doing so, the Officer erred in dismissing a factor which is relevant to the equitable underlying purpose of section 25 of *IRPA* and in addition did not apply constraining law. This constituted reviewable error under the foregoing jurisprudence.

[16] I also note the Officer's consideration of establishment in Canada, adverse country conditions in Syria and Iraq, and the best interests of the children was entirely focussed on "hardship", references to which are numerous (18 times) and are made repeatedly and throughout

the Decision. The Decision does not mention the terms, or for that matter, give any discernable consideration to humanitarian or compassionate considerations, except in the opening paragraph where those concepts are replaced by "H&C."

[17] At the hearing, I discussed the consequences of a "hardship" centric analysis in this case, and whether it was contrary to the Supreme Court of Canada's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. I referred to *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 [*Marshall*], applied in *Orbizo v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 203 [per Strickland J], *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 [per Walker J], *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 [per Norris J], *Bhalla v Canada (Citizenship and Immigration)*, 2019 FC 1638 [per Diner J], *Cezair v Canada (Citizenship and Immigration)*, 2018 FC 886 [per Gleeson J], *Yovel v Canada (Citizenship and Immigration)*, 2019 FC 310 [per Manson J].

[18] I stated the following in *Marshall*:

> [29] In my respectful opinion, the Supreme Court of Canada in *Kanthasamy* changed the legal tests representatives of the Minister must use to assess H&C applications. Undoubtedly, prior to *Kanthasamy*, hardship was the general test although the courts had acknowledged that it was not the only test.
>
> [30] *Kanthasamy* reviewed the history of the Minister's humanitarian and compassionate discretionary power enacted set out in section 25 of *IRPA*. The Supreme Court of Canada re-established that *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 [*Chirwa*] provided an important governing principles for H&C assessments, principles that are to be applied along with the older "hardship" analysis required by the Guidelines:
>
> > [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed

> by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.

[31] The Supreme Court of Canada then stated as follows:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.

[32] As to hardship the Supreme Court of Canada said that that the hardship tests continue to apply, but added:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not

> determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> [Emphasis in original]
>
> [33] In reviewing the reasons of the Officer, I am unable to detect any appreciation of the *Chirwa* approach. In my respectful opinion, H&C Officers should not only consider the traditional hardship factors, but in addition, they must consider the *Chirwa* approach. I do not say that they must recite *Chirwa* chapter and verse, nor that there are any magic formulae or special words these Officers must use. But the reviewing courts should have some reason to believe that the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense.
>
> [34] The Applicant submits that the Minister's representative assessed every factor through the lens of hardship, and hardship to the Applicant, and that in doing so the Officer applied the wrong legal test. I have reviewed the Officer's reasons and have come to the conclusion that the Applicant is correct.
>
> [35] In my respectful view, the Officer's assessment of the Applicant's establishment was indeed filtered through the lens of hardship. …

[19] I granted judicial review in *Marshall* because of its hardship-centric analysis of section 25 and because, *Kanthasamy* at para 25 requires an H&C assessment to "consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case" [Emphasis by Supreme Court of Canada].

[20] Counsel for the Respondent submitted this issue was not a ground on which H&C's exceptional relief was sought and therefore was not one the Court should consider. I do not disagree that generally on judicial review the Court should consider the findings of the Officer in the context of submissions made by applicant's counsel. Therefore I make no finding on this point, noting the matter will returned for redetermination on the ADR issue in any event.

[21] I also acknowledge the Officer found it “highly determinative” the Applicants had not adduced sufficient evidence to indicate they had lost their status as refugees in the US, and noting this was ‘likely’ a third relocation option for them. The RPD found they could return as refugees to the US given they were resettled in the US by the UNHRC. But as the Officer noted, there is a statement on the United States Citizenship and Immigration Services [USCIS] website that refugees who do not obtain refugee travel documents prior to leaving the US “may be unable to re-enter the Untied States” or “may be placed in removal proceedings.” I make no finding in this regard except to say it may or not be the case in their circumstances.

IV. Conclusion

[22] Because it does not accord with constraining jurisprudence, I have concluded the decision is not justified as required by *Vavilov*. Therefore, judicial review will be granted.

V. Certified Question

[23] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-1423-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded to a different decision maker for reconsideration, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1423-21
STYLE OF CAUSE:	JOLITTE AMANOUIEL YOUNAN, ALBRON EVEN ADMON ADMON, AND ONEEL YOUSF v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	MARCH 29, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	APRIL 6, 2022

APPEARANCES:

Alexandra Veall	FOR THE APPLICANTS
Lorne McClenaghan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Grice & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT