

Federal Court



Cour fédérale

Date: 20220411

Docket: IMM-3970-21

Citation: 2022 FC 515

Ottawa, Ontario, April 11, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

**SANTHIRAVATHANI AMALESKUMAR
ABINAYAN AMALESKUMAR**

Applicants

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Santhiravathani Amaleskumar [Principal Applicant] and her son [Minor Applicant], are citizens of Sri Lanka. The Applicants seek judicial review of the decision of a Senior Immigration Officer [Officer] dated April 24, 2021 refusing to grant the Applicants' application for permanent residence from within Canada based on humanitarian and

compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] According to the Applicants' narrative in support of their H&C application, the Principal Applicant is a Tamil, who was born and lived in the northern province of Sri Lanka. The Principal Applicant and her family were accused by Sri Lankan naval officers of supporting the Liberation Tigers of Tamil Eelam. Her husband ultimately relocated to Italy. In 2012, naval officers came to the Principal Applicant's home looking for her husband, as they understood that he had returned to Sri Lanka. She was threatened with abduction and severe punishment if she did not reveal his location and was ultimately raped and sexually abused by the naval officers.

[3] After the birth of the Minor Applicant, the Principal Applicant joined her husband in Italy. The Principal Applicant states that once her husband became aware that she had been raped and sexually abused, his conduct towards her completely changed, as he viewed her as a "dirty woman" and no longer fit to be his wife. He physically and verbally abused her on a daily basis, physically assaulted the Minor Applicant on a number of occasions and threatened the life of both Applicants. In 2016, the Applicants fled to Italy to escape the abuse that they were suffering at the hands of the husband/father, and ultimately arrived in Canada after time spent in immigration detention in the United States. The Applicants made a refugee claim in Canada, which was ultimately unsuccessful.

[4] The Principal Applicant states that she is afraid to go back to Sri Lanka as the north and east of Sri Lanka are almost entirely occupied by government forces who are known to abuse women.

[5] The Principal Applicant's narrative was supported by an affidavit from her sister, and letters from her mother, her uncle, another family member and a community worker from the South Asian Women, in addition to various articles.

[6] It is important to note that, in denying her H&C application, the Officer made no adverse credibility findings with respect to the underlying facts of abuse suffered by the Principal Applicant at the hands of her husband, nor in relation to the evidence that the Principal Applicant had been raped and sexually abused by the Sri Lankan naval officers.

[7] The Applicants assert that the Officer made a number of errors which render the decision unreasonable, including that: (a) the Officer generally failed to follow the principles applicable to H&C applications as set out by the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61; (b) the Officer failed to properly consider the evidence before them regarding the rapes and sexual abuse suffered by the Principal Applicant and the evidence regarding her mental health; (c) the Officer failed to consider and apply the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* in considering the Applicants' evidence; (d) the Officer erred in their assessment of the hardship that would be experienced by the Applicants if returned to Sri Lanka; and (e) the Officer was not alert, alive and sensitive to the best interests of the Minor Applicant.

I. Analysis

[8] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. An H&C determination under section 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanhasamy, supra* at paras 13, 28; *Caleb v Canada (Citizenship and Immigration)*, 2020 FC 1018 at para 10].

[9] The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore “deserving of considerable deference by the Court” [see *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30]. There is no “rigid formula” that determines the outcome [see *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 7].

[10] The applicable standard of review of an H&C decision is reasonableness [see *Kanhasamy, supra* at para 44]. In conducting a reasonableness review, the Court’s focus is on “the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome” [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 83]. The Court must ask itself whether the decision bears the hallmarks of reasonableness – namely, justification, transparency and intelligibility – and whether it is justified in relation to the

relevant factual and legal constraints that bear on the decision [see *Vavilov, supra* at para 99]. The burden is on the party challenging the decision to show that it is unreasonable and the Court “must be satisfied that any shortcomings or flaws relied on [...] are sufficiently central or significant to render the decision unreasonable” [see *Vavilov, supra* at para 100].

[11] While a number of issues were raised on this application, I find that the determinative issue is the Officer’s consideration of the Principal Applicant’s mental health and the evidence related thereto.

[12] In considering the Principal Applicant’s mental health, the Officer stated:

The application further indicates that the applicants would suffer from hardship of returning to Sri Lanka due to their medical conditions. The counsel indicate that the adult applicant suffers from Post-Traumatic Stress Disorder, major depression disorder and anxiety, while the child suffers from Severe Febrile seizure. I note that no documents were submitted that establish that the applicants must remain in Canada to receive treatment. While I am sympathetic to the applicants’ personal circumstances, the information before me does not indicate they would be unable to receive care in Sri Lanka nor does it state it would be severely inadequate. Based on the totality of the information before me, I find there is insufficient evidence to demonstrate that the applicants would experience a direct, negative affect as a result of Sri Lanka’s healthcare system. I also note that the applicants have not submitted any objective documentation to indicate that health care plans in Sri Lanka are so prohibitively expensive that the applicants would be unable to obtain some form of treatment. While I acknowledge that the healthcare in Sri Lanka is not as adequate as Canada’s, I have not been provided sufficient objective evidence to support the applicants would be denied access to such treatment. While I am sympathetic to the health concerns of the applicants, overall based on the information at hand, I am unable to provide more than some weight for this factor.

[13] I find that the Officer's reasons exhibit a failure to engage with the evidence before the Officer regarding the Principal Applicant's mental health. While the Officer stated that the Applicants' "counsel indicates" that she suffers from post-traumatic stress disorder, major depression disorder and anxiety, counsel's submissions were actually supported by the psychological evaluation report of Dr. Libarian dated December 14, 2017 and a brief report from Dr. Sampasivam (also a psychologist) dated September 5, 2019.

[14] Dr. Libarian's report concludes that the Principal Applicant's symptoms of depression following her sexual, physical and emotional abuse are severe and that she suffers from severe anxiety, post-traumatic stress and psychological disorganization. She concluded that: (a) the Principal Applicant's acute state of mental health is a cause of concern; (b) the Principal Applicant's fear of being sent back to Sri Lanka and knowing that her life would then be in serious danger does not help alleviate her depression, anxiety, loss of sleep as well as her impaired attention span and concentration; (c) the Principal Applicant needs to be assessed by a psychiatrist, prescribed medication and regularly assessed in order to stabilize her condition; and (d) staying in Canada would make the Principal Applicant feel mentally and emotionally safe, which would decrease her depression, anxiety and alleviate her post-traumatic stress.

[15] The brief report of Dr. Sampasivam states that a psychological evaluation was conducted of the Principal Applicant over a two-day period and that the Principal Applicant reports symptoms consistent with the diagnosis of post-traumatic stress disorder, major depressive disorder, generalized anxiety disorder and panic disorder. The report also indicates that a more detailed

report will follow, although the detailed report was not included in the Applicants' H&C application.

[16] Nowhere in the decision does the Officer engage with these reports, despite the fact that the Officer does not dispute the Principal Applicant's mental health diagnosis. The evidence of Dr. Libarian is clear that the Applicant requires mental health treatment, that she has a fear of returning to Sri Lanka that is worsening her condition and that staying in Canada would improve her medical condition. In the face of the medical evidence before them, I find that the Officer was required to consider and weigh the potential impact to the Principal Applicant's mental health if she were to return to Sri Lanka, regardless of whether mental health care is available in Sri Lanka [see *Kanhasamy, supra* at para 48; *Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212; *Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at para 44; *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at para 29]. I find that the Officer's decision does not align with the Supreme Court's guidance in *Kanhasamy*, as rather than assessing whether the Principal Applicant's mental health would deteriorate due to her removal to Sri Lanka, the Officer relied solely on the availability of healthcare in Sri Lanka.

[17] Moreover, H&C applications are to be considered holistically, taking into consideration all of the relevant facts and factors. Yet, in this case, there is not a single mention in the Officer's reasons of the rapes and sexual abuse suffered by the Principal Applicant. While the Officer makes one reference to abuse suffered by the Principal Applicant by "another individual" while in Sri Lanka, it is entirely unreasonable for the Officer to fail to expressly address the sexual nature of the abuse and that her multiple abusers were members of the Sri Lankan navy, given that: (a) the

Principal Applicant's mental health disorders are directly related to her rapes and sexual abuse; (b) the Principal Applicant faces removal to the very country where the rapes and sexual abuse occurred; and (c) there was evidence before the Officer that there remains an on-going risk to women of being abused in Sri Lanka. I find that the Officer's decision demonstrates a lack of sensitivity to the evidence and the impact of their decision.

[18] Given the Officer's failure to consider and weigh the potential impact to the Principal Applicant's mental health if she were to return to Sri Lanka and the Officer's lack of sensitivity to the evidence, I find that the Officer's decision is unreasonable and must be set aside.

[19] For the sake of completeness, I note that the Applicants included in their materials a detailed assessment note prepared by Dr. Sampasivam, as referenced in Dr. Sampasivam's brief report dated September 5, 2019. As noted above, this assessment report was not included in the Applicants' H&C application. The Respondent opposes the Court's consideration of this assessment note on the basis that it was not before the Officer and does not fall within one of the exceptions to the general rule against the admission of new evidence as set out by the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20. My determination of this application did not take into account this assessment note.

II. Conclusion

[20] The application for judicial review is allowed, the Officer's decision is set aside and the matter is remitted to a different officer for redetermination. On redetermination, the Applicants

shall be permitted to update their application and make additional submissions, should they choose to do so.

[21] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-3970-21

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated April 24, 2021 refusing the Applicants’ application for permanent residence based on humanitarian and compassionate grounds is set aside and the matter is remitted to a different officer for redetermination. On redetermination, the Applicants shall be permitted to update their application and make additional submissions, should they choose to do so.
3. The parties proposed no question for certification and none arises.

“Mandy Aylen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3970-21

STYLE OF CAUSE: SANTHIRAVATHANI AMALESKUMAR,
ABINAYAN AMALESKUMAR v THE MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: VIDEOCONFERENCE

DATE OF HEARING: APRIL 7, 2022

JUDGMENT AND REASONS: AYLEN J.

DATED: APRIL 11, 2022

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