Federal Court  Cour fédérale

Date: 20220615

Docket: IMM-3713-21

Citation: 2022 FC 900

Ottawa, Ontario, June 15, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

DHORTHI SANJANA RAJU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Dhorthi Sanjana Raju is a citizen of Fiji. She sought permanent residence in Canada on humanitarian and compassionate [H&C] grounds, following the breakdown of her marriage of eight years because of domestic abuse and violence at the hands of her former spouse, resulting in her hospitalization. Their young son witnessed the abuse and he also was a victim.

[2] The Applicant relocated to a women's shelter with her son, who experienced behavioural issues that arose from having witnessed the abuse. He eventually was diagnosed with attention deficit hyperactivity disorder [ADHD] and started to receive help.

[3] A Senior Immigration Officer of Immigration, Refugees and Citizenship Canada [IRCC] rejected the Applicant's H&C application. The Applicant now seeks, by way of judicial review, to have the IRCC's decision set aside and her H&C application reconsidered by a different officer.

[4] The overarching issue for determination is the reasonableness of the decision. There is no dispute that the presumptive reasonableness standard of review applies to the Court's determination of this matter: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10, 25.

[5] I am satisfied that the Applicant has met her burden of showing that the IRCC's decision is unreasonable because of a flawed assessment of the "best interests of the child" [BIOC], and because the Officer misapprehended or ignored the Applicant's evidence, resulting in a lack of justification: *Vavilov* at paras 85-86, 100, 125-126. For the reasons below, I therefore grant this judicial review application.

II. Analysis

[6] The Applicant submits that the Officer made the following errors:

(1) The BIOC factors were poorly examined and ill-considered;

(2) State protection was erroneously imported into the H&C assessment; and

(3) The Officer misconstrued evidence, disregarded key facts, and the assessment was devoid of empathy and compassion.

[7] The Applicant has the onus of establishing that H&C relief is warranted and that her personal circumstances are such that having to apply for a visa outside Canada would cause a degree of hardship that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61[*Kanthasamy*] at para 21. The presence of *some* degree of hardship does not mean that an H&C application necessarily will be successful: *Kanthasamy*, at para 23. Relevant factors are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances and should not fetter the immigration officer's discretion to consider all relevant factors: *Kanthasamy* at paras 27-33.

[8] With these principles in mind, I turn to each of the above alleged errors.

(1) BIOC Assessment

[9] I am persuaded that the BIOC assessment in this case is flawed and, hence, the H&C decision cannot stand.

[10] A decision under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, will be found unreasonable if the interests of children affected by the decision are not sufficiently considered. A decision maker 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 para 39. The Officer here failed, as explained below, to be “alive, alert, and sensitive” to the best interests of the Applicant’s son: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 75.

[11] I find the reasons do not demonstrate that the Officer engaged with the following: the Applicant’s son had little to no connection to Fiji; the treatment and special needs of this child because of his behavioural issues and ADHD diagnosis; the impacts that a change to his education and environment would have on his mental health; and the impact of the return to Fiji on his mother and her ability to care for him. In short, the Officer failed to articulate the suffering the son would endure because of the IRCC’s decision: *Vieira Sebastiao Melo v Canada (Citizenship and Immigration)*, 2022 FC 544 at paras 51- 52, citing *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at paras 9-12.

[12] Further, this failure is evident, in my view, from the expressed expectation that the child’s young age will permit him to transition to the education system in Fiji and the environment. I find this sentiment ignores or discounts the undisputed fact that the son’s age did not shield him from the aftereffects of witnessing his mother’s abuse or living with domestic violence, and the resultant ADHD. I conclude the lack of a reasonable explanation for the Officer’s expectation in the circumstances renders the decision unreasonable.

(2) State protection and H&C assessment

[13] I find that although the existence of state protection may be considered in an H&C assessment, the Officer's treatment of protection available in Fiji is unreasonable in this case.

[14] I agree with the Applicant that there is no requirement for an H&C applicant to rebut a presumption of state protection, or to exhaust available state protections, before being granted H&C relief: *Lowell v Canada (Citizenship and Immigration)*, 2009 FC 649 at para 19; *Walcott v Canada (Citizenship and Immigration)*, 2011 FC 415 [*Walcott*] at para 63.

[15] The existence of state protection nonetheless may be a relevant factor in an H&C assessment; it cannot be a determinative factor, however, and it does not relieve the decision maker from assessing whether an H&C applicant's particular circumstances warrant relief, regardless of any available protection: *Walcott*, at para 64.

[16] I find that the very report from which the Officer quotes extensively in the decision provides no rational support for the conclusion that "Fiji offers adequate protection to women including women fleeing domestic abuse situations…."

[17] The United States Department of State's (2020) annual report on Fiji indicates that rape (including spousal rape), domestic violence, incest and sexual harassment are significant problems, exacerbated by Covid-19 movement restrictions resulting in victims confined with their abusers. Calls to a government helpline increased more than five-fold over a three-month

period. Almost two in three women in an intimate relationship experienced physical or sexual violence in their lifetime. Although the police follow a “no drop” policy, even in the case where a victim later withdraws the accusation, they do not follow it consistently. Further, the authorities sometimes release offenders without conviction on condition that they maintain good behaviour.

[18] The Officer notes that the protection to women “may not be perfect, however that is not the threshold to be measured.” Yet the only threshold mentioned by the Officer is that the protection is “adequate.” Without any explanation or rationale offered for this conclusion, especially in light of the quoted report, I find it is not justified in the circumstances, and thus, warrants the Court’s intervention.

(3) Officer Misconstrued or Disregarded Evidence and Key Facts

[19] In addition to the above, I find the decision is unreasonable in the following respects:

(a) The Officer offered no explanation for the conclusion that the Applicant may be able to return to New Zealand through her son’s citizenship. Although the Applicant’s son was born in New Zealand, the evidence of record in this matter is that the son holds a Fijian passport that states his nationality is Fijian, notwithstanding his place of birth.

(b) Although the decision recites several facts under the heading “Establishment,” there is no discussion of the Applicant’s establishment in Canada in the global assessment of the relevant H&C factors.

(c) The Officer’s analysis of the relationships with the ex-spouse is not intelligible. For example, the Officer acknowledges a “court ordered document that stated the spouse has parenting rights” but discounts it, and the Applicant’s fear for her son, because of a lack of evidence regarding what parenting time, if any, the ex-spouse spends with the Applicant’s son. Further, the Officer finds that there is “no surety that [the ex-spouse] will remain [in Canada] permanently.” The evidence shows that there is a lack of

effective protection for women fleeing domestic violence in Fiji, and that the ex-spouse was willing to travel to Fiji, from New Zealand, to facilitate his previous extra-marital affair.

(d) The Officer failed to recognize that the domestic abuse suffered by the Applicant is a compassionate factor to be weighed: *Febrillet Lorenzo v Canada (Citizenship and Immigration)*, 2019 FC 925 at para 18; *Pryce v Canada (Citizenship and Immigration)*, 2020 FC 377 at paras 47-48. The Officer provides a summary of the relevant facts under the heading "Family Violence," and then focusses on the lack of evidence of the current relationship between the ex-spouse and the Applicant's son. The Officer does not engage or provide an analysis, however, on the family violence factor in the global assessment. In fact, I find that this is one of several examples where the Officer summarized facts, made conclusory statements, but failed to provide supporting analysis or rationale. This is unreasonable: *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 412 at para 67. I thus find that the Officer's global assessment was insufficient in the circumstances.

[20] As a final comment, I observe that the Respondent declined to make substantive oral submissions at the hearing of this matter before the Court and indicated instead that the Respondent relies on his written submissions. While the Respondent is entitled to do so, this strategy raises the unanswered question of whether the hearing was an effective use of the Court's scarce resources in the circumstances.

III. Conclusion

[21] For the above reasons, I grant the Applicant's judicial review application. The H&C decision is set aside and the matter will be remitted to a different officer for redetermination.

[22] Neither party proposed a question for certification and I find that none arises in the applicable circumstances.

JUDGMENT in IMM-3713-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The May 18, 2021 decision of the IRCC rejecting the Applicant's H&C application is set aside.
3. The matter will be remitted to the IRCC for redetermination by a different officer.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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