Federal Court  Cour fédérale

**Date: 20220712**

**Docket: IMM-3407-21**

**Citation: 2022 FC 1022**

**Ottawa, Ontario, July 12, 2022**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**SAJU VINCENT**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Saju Vincent, seeks judicial review of the decision of a Senior Immigration Officer of Immigration, Refugees and Citizenship Canada ("Officer"), dated May 5, 2021, refusing the Applicant's application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the Officer's decision is unreasonable because the Officer erred in their assessment of the best interest of the child ("BIOC") and the hardship the Applicant would face in India in accessing quality healthcare and securing employment.

[3] For the reasons that follow, I find that the Officer's decision is unreasonable. This application for judicial review is allowed.

## II. **Facts**

### **A.** *The Applicant*

[4] The Applicant is a 50-year-old citizen of India. His wife and two teenage daughters (ages 14 and 19) are also citizens of India and currently reside in Kerala, India.

[5] The Applicant states that he grew up in poverty and has spent the better part of his life working to improve his family's living situation, including working abroad for over nine years.

[6] In October 2012, the Applicant received an offer of employment and signed an employment agreement to work as a scaffolder for URS Flint Energy Services Ltd. ("Flint") in Calgary, Alberta. He was granted a Canadian work permit valid until October 27, 2015.

[7] Following the Applicant's arrival in Canada on October 27, 2013, he learned that Flint did not have a position for him. The Applicant sought other employment. Since April 2014, he

has worked as a caregiver, a handyman, and a mover. He has also volunteered with the Calgary Food Bank, the Canadian Cancer Society, and the Malayalee Cultural Association of Calgary.

**B.** *Decision Under Review*

[8] By letter dated May 5, 2021, the Officer refused the Applicant's H&C application. The Officer considered the Applicant's establishment in Canada, the adverse country conditions he would face in India, the Applicant's health conditions, and the BIOC.

[9] The Officer's decision gives some weight to the Applicant's degree of establishment in Canada over seven years, including his participation in religious and volunteer activities, and the development of relationships in the community. In assessing the risk of return to India, the Officer considered the Applicant's health conditions and found that the Applicant had not demonstrated that he would be unable to access adequate healthcare or medical treatment in India. The Officer also found insufficient evidence to demonstrate that the Applicant would face financial hardship in India due to the cost of healthcare, the economic situation, or his inability to secure employment because of his health.

[10] With respect to the BIOC as it relates to the Applicant's two daughters, the Officer was not satisfied that the Applicant's daughters would be deprived of a viable education or their basic needs should the Applicant return to India. Overall, the Officer was not satisfied that the Applicant's circumstances warrant an exemption on H&C grounds.

## III. **Issue and Standard of Review**

[11] The issue in this application for judicial review is whether the Officer's decision is reasonable.

[12] Both parties submit that the issue is to be reviewed on the reasonableness standard. I agree that the appropriate standard of review for H&C decisions is reasonableness (*Qureshi v Canada (Citizenship and Immigration)*, 2020 FC 88 at paras 5-8; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[13] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[14] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence

before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

## IV. **Analysis**

[15] Under subsection 25(1) of the *IRPA*, the Minister may grant permanent residency to a foreign national who does not meet the requirements of the *IRPA* if the circumstances are justified under H&C considerations, including the BIOC directly affected. An H&C exemption is a discretionary remedy. What warrants relief will vary depending on the facts and context of the case. This means that the decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) ("*Baker*") at paras 74-75).

### A. *Hardship and adverse country conditions*

[16] The Applicant submits that the Officer failed to meaningfully grapple with the risks associated with his return to India given his health conditions, the systemic issues regarding quality of healthcare in India, and the challenges he would face in securing employment in India.

[17] In the decision, the Officer acknowledged the Applicant's history of carcinoma of the small intestine and his other health issues, which are currently being treated in Canada. The Officer also considered the country conditions documentation outlining the challenges faced by

Indian citizens in accessing affordable health services in India. However, the Officer noted that in September 2018 the government of India launched an initiative to achieve universal health coverage and that it "has made significant progress and demonstrated its ability in providing comprehensive and affordable health care to its citizens." As such, the Officer found that the Applicant had not demonstrated that he would be unable to access adequate healthcare or medical treatment in the state of Kerala, where he would likely return, nor was there sufficient evidence to demonstrate that he would face financial hardship due to his medical conditions.

[18] With respect to the risk of economic hardship in India, the Officer sympathized with the poverty the Applicant faced while growing up in India, yet found insufficient evidence that he would suffer from financial hardship upon his return. The Officer noted the Applicant's concerns that he would not be able to continue supporting his family financially and that potential employers in India would not want to hire him due to his medical situation. However, based on the Applicant's previous employment in construction in the UAE and Kuwait, and his work experience in Canada, the Officer found that his specialized and employable skills would assist him in securing employment in India. The Officer stated: "he is a determined man who has demonstrated his resiliency by managing to support himself and his family members through his perseverance." The Officer also noted the evidence of the Applicant's remittances to his family in India, yet found that since he had been struggling financially in Canada, it is likely that his family in India would not have been able to rely on his consistent financial support.

[19] The Applicant submits that the Officer discounted much of the objective country condition evidence, which demonstrates that efforts in India to provide universal health care have

not changed the system for the better and that implementation of quality healthcare has been slow. He argues that India's attempt to implement universal health care does not necessarily translate into the ability to access *quality* public health care required to maintain his health.

[20] The Applicant further submits that by concluding that his work experience in Canada and his previous employment in construction would assist him in finding work in India, the Officer unreasonably held the Applicant's adaptability and resiliency against him (*Singh v Canada (Citizenship and Immigration)*, 2019 FC 1142 ("*Singh*") at para 37). The Applicant notes that it is unclear upon what basis the Officer found that his specialized and employable skills would make him attractive to employers in India. This is particularly so since he has only ever been able to maintain stable employment *outside* of India, and has been forced to live away from his family in order to provide them with some level of financial security.

[21] The Respondent maintains that the Applicant failed to meet the onus of showing that the adverse country conditions in India would have a sufficient negative impact on him to warrant an H&C exemption. The Respondent submits that the Officer adequately considered the objective country condition evidence of the healthcare system in India and conducted an appropriate analysis based on the evidence produced by the Applicant (*Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paras 27-28). This includes evidence that the government of India has taken steps to provide comprehensive and affordable healthcare options for Indian citizens – particularly in the Kerala region, where the Applicant's family resides. It was thus reasonable of the Officer to find that the Applicant would have access to healthcare services in India if he needed them.

[22] With regard to any difficulty the Applicant would face in securing employment in India, the Respondent submits that the Officer reasonably determined that it was unclear how potential employers would learn about his medical conditions. The Respondent further submits that the Officer reasonably noted the lack of evidence of how the Applicant financially supported his family during periods of unemployment. The Respondent contends that when seeking H&C relief, it is not sufficient to simply demonstrate adverse country conditions without establishing a link between those conditions and his or her own personal circumstances (*Paramanayagam v Canada (Citizenship and Immigration)*, 2015 FC 1417 ("*Paramanayagam*") at paras 19-20; *Jean v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1104 ("*Jean*") at paras 14-15).

[23] I find the case at hand to be distinguishable from *Paramanayagam* and *Jean*, in which this Court found that the applicants had not established that adverse country conditions had any connection to their personal circumstances. Here, the Applicant emphasizes issues related to accessing quality healthcare in India. Given his medical conditions, these issues are directly related to his personal situation. I also agree with the Applicant's assertion that recognition of a government initiative to implement universal healthcare does not itself address the challenges of accessing quality public healthcare. As noted in *Ramesh v Canada (Citizenship and Immigration)*, 2019 FC 778 at paragraph 20:

> [an officer's] reliance solely on the efforts of the government to effect change is a reviewable error. An officer must look beyond the efforts of or changes implemented by a government to determine the impact those efforts or changes have had on actual societal conditions. […]

[24] Nevertheless, I am convinced that in this case the Officer adequately reviewed the impact of government efforts on actual access to healthcare in the Kerala region. This included relying on more recent country condition documentation. The Officer's reasons state:

> I am satisfied that the applicant will have access to adequate and affordable healthcare and medical treatments through the Health Centres in Kerala, which provide free and comprehensive primary care, including free essential drugs and diagnostic services.

[25] While I may have reached a different conclusion myself, I find that the Officer adequately engaged with the evidence of healthcare in India, including conducting independent research that addresses more recent health initiatives undertaken by the government of India. I am satisfied that the Officer's finding on this point reflects a rational chain of analysis (*Vavilov* at para 85).

[26] However, the decision becomes unreasonable when the Officer states that the Applicant would be able to secure employment in India as a result of his specialized and employable skills. In arriving at this conclusion, the Officer erroneously used the Applicant's resourcefulness and resiliency against him. This is particularly troubling given the Applicant's statement that his ability to work would be affected by his medical issues, which arose during his time in Canada. It is worth reiterating, as I noted in the case of *Singh* at paragraph 37, that this approach is deeply flawed:

> […] this Court has consistently admonished officers who have held the fact that an individual is "resourceful" and "enterprising" against them. Following the Officer's reasoning, "the more successful, enterprising and civic minded an applicant is while in

> Canada, the less likely it is that an application under section 25 [of the *IRPA*] will succeed" (*Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 26; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 35; *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at para 53; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2019 FC 134 at para 8). One would expect that the message has been received at this point.

[27] The facts in this case are quite similar to those in the case of *Singh*, in which the applicant was the sole financial provider for his family and had also left his wife and children in India in order to offer them a better life (paras 35-37). In this case, the Officer's decision fails to acknowledge the evidence that the Applicant had previously struggled to find employment in India. This is precisely why he left India in the first place: to seek out employment abroad. The question I posed in *Singh* is equally applicable here: "why would the Applicant have left his young children and his wife in India, whom he missed, if he would have been able to support them in India all along?" (at para 36).

[28] I also find that it was unreasonable of the Officer to determine that the Applicant's family did not likely rely on his consistent financial support from Canada, and that "there is little information before me to indicate that his family members struggled financially during the times when they received no support from him." In fact, the record before the Officer includes ample evidence that at least six of the Applicant's family members depend on him for financial support. Letters of support from the Applicant's wife, his two daughters, his brother and sister all attest to the financial support the Applicant provides his family, including his aging parents. The Applicant's sister describes the Applicant as the family's "foundation stone", and his brother's support letter states:

> Saju being in Canada has brought a lot of ease for our family as he is supporting our parents and trying to break the cycle of poverty in our family. […] If Saju returns to India, we will not be able to afford his medical treatments or our parents' medical treatments. Our family will go into great poverty trying to finance Saju's and our parents medical treatments […] Additionally, there is no work here for Saju. Even if he does find a job it will be piece work but he will find difficulty in gaining employment, because of his age and health condition. Employers here want someone who is healthy, young and strong.

[29] Letters from the Applicant's parents' physician in Kerala indicate that the Applicant's father and mother are completely dependent on him to receive lifelong medical treatment. Furthermore, letters of support from several community members in Calgary reiterate how the Applicant has been financially supporting his family, and demonstrate that he received financial support from church members while he was recovering from surgery.

[30] Finally, I find that the Officer's conclusion fails to account for how the Applicant would be returning to India with medical conditions he did not have before his arrival in Canada – or while working physical jobs in the construction industry, for that matter. The Applicant is in remission from stomach cancer and suffers from various ailments that continue to require medical attention including chronic cough and chest pain, a hernia that requires surgical attention and hypertension. I agree with the Applicant that the Officer's analysis focused on whether it would be possible to mitigate the hardship the Applicant and his family would face, rather than adequately weighing the risks associated with a removal from Canada.

**B. *BIOC***

[31] In discussing the BIOC, the Officer found insufficient evidence to demonstrate that the Applicant's daughters would be deprived of viable education or other basic needs should the Applicant return to India. The Applicant's H&C submissions noted that he would face financial hardship in India, which would prevent him from supporting his daughters' education. In response, the Officer reiterated that the Applicant's work experience and skills "would assist him in securing employment in India and enable him to continue providing financial assistance to his family members, including his daughters". In considering the fact that the Applicant's family currently lives in an unsafe area where his daughters are at risk of kidnappings and sexual assault, the Officer found that the Applicant and his wife would be able to protect their children in India. The Officer emphasized that the purpose of relief under subsection 25(1) of the *IRPA* is not to make up for the difference in standard of living between Canada and other countries.

[32] The Applicant submits that the Officer's cursory analysis of the BIOC lacks any indication that the children's best interests were well-identified and examined with a great deal of attention, as required by *Kanthasamy* (at para 39). In doing so, the Applicant submits that the Officer incorrectly applied a hardship and 'basic needs' analysis to the BIOC assessment, particularly in finding insufficient evidence that the Applicant's daughters would be deprived of an education "or other basic needs" should the Applicant return to India. The Applicant maintains that the Officer failed to undertake a contextual analysis of the multitude of factors that may impinge on his daughters' best interests (*Kanthasamy* at para 35; *Nagamany v Canada*

*(Citizenship and Immigration)*, 2019 FC 187 ("*Nagamany*") at para 38; *Manriquez v Canada (Citizenship and Immigration)*, 2022 FC 298 ("*Manriquez*") at paras 14-17; 22).

[33] The Applicant also takes issue with how the Officer addressed the significant safety risks faced by his daughters by noting: "it is unfortunately that they have to take extra precaution," and further minimized the dangers by stating, "the applicant and his wife are loving parents who will continue to utilize their knowledge to protect their children in India." The Applicant argues that such reasoning falls markedly short of the sensitivity and attentiveness required of a BIOC assessment. To support his position, the Applicant cites *Augusto v Canada (Citizenship and Immigration)*, 2022 FC 226 ("*Augusto*") at paragraphs 39 and 42:

> [39] In my view, the risks related to living in a community affected by violence, poverty and economic hardship, and the evidence of how these issues have affected the Applicants and their family members warranted more careful consideration. […]
>
> [42] I find that the Officer's selectivity resulted in a misconstruing of the evidence that failed to account for the Applicants' specific situation. It is as if the Officer filtered through the record to find reasons to explain how the risks to the Applicants and their children could be mitigated, rather than considering the harsh reality they would face in Brazil. This approach fails to reflect the requirement that the Officer review the evidence as a whole through a compassionate and empathetic lens and strays from the proper question to be asked: what is in the children's best interests?

[34] The Respondent maintains that the Officer did not ignore the submissions related to the BIOC and accurately reviewed the Applicant's statutory declaration and the letters from his siblings, his spouse and his daughters – all of which focus on how a negative decision would affect the Applicant's daughters' education. The Respondent states that the Applicant did not

make any submissions about the effects on his daughters' emotional, social and cultural welfare and chose to limit his submissions to his daughters' ability to obtain an education. As such, the Respondent argues that the Applicant failed to establish a reviewable error in the BIOC analysis.

[35] I agree with the Applicant that the Officer conducted a flawed BIOC analysis that does not reflect the requirements set out by the Supreme Court in *Kanthasamy*. The Officer's decision fails to first articulate what would be in the children's *best* interests before weighing the BIOC against other elements of the H&C application (*Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 16). In finding that there is insufficient evidence to demonstrate that the Applicant's daughters "[…] would be deprived of viable education or other basic needs should he return to India," the Officer appears to have assessed whether the children would be able to continue *surviving* in India, rather than what is in their best interests moving forward. This focus on the children's basic needs does not reflect a proper BIOC assessment (*Manriquez* at para 22). In doing so, the Officer minimized the BIOC and failed to grapple with the real-life impacts of a negative decision on the Applicant's daughters (*Nagamany* at para 44; *Baker* at para 75).

[36] Additionally, hinging a large portion of the BIOC analysis on the finding that the Applicant can likely secure employment in India to support his daughters – despite evidence that suggests the contrary – lacks rational. The evidence before the Officer indicates that the Applicant first left India to seek out work opportunities to better support his family. There was also ample evidence on the record of how his family, including his daughters, depend on him financially and that his return to India would not only affect his children, but the extended family that relies on his remittances from Canada (*Augusto* at para 41). While the Respondent argues

that the Applicant's H&C application was limited to addressing how his removal would affect his daughter's education, I find this to be an oversimplification of the evidence. It is clear that the support letters on the record and the Applicant's statutory declaration address the broader threat of financial insecurity and poverty that would result from the Applicant's departure from Canada. For instance, the letter from the Applicant's eldest daughter, Liya, states:

> My father went to Canada when I was eleven. It has been a long time, but I understand that my father went to Canada to provide for us and our family. I am currently in grade twelve. […] The only person who is supporting our family financially is my father. If my father returns back to India, this will greatly affect me and my sister's studies as well as our whole family can go into poverty.
>
> [Emphasis added.]

[37] Finally, in light of the Officer's statements that the Applicant and his wife could continue to protect their children from the threat of violence India, and that the Applicant's "family members in India are alert and cautious of these issues," it is my view that to be 'alert and cautious' does not make the safety risks for the children less pronounced. I find it unintelligible to suggest that the Applicant and his family's level of caution somehow mitigates the risks faced by the Applicant's daughters.

[38] Overall, I find that the Officer failed to adequately consider the cumulative effects of a negative H&C decision and the hardship that would ensue should the Applicant return to India. This includes how the Applicant's removal would affect the best interests of his daughters and the well-being of his family, who rely on his financial support to survive. I therefore do not find

that the Officer's reasons are justified in light of the evidence and the facts in this case (*Vavilov* at para 85).

## V. **Conclusion**

[39] For the reasons outlined above, I find that the Officer's decision is unreasonable. No questions for certification were raised, and I agree that none arise.

**JUDGMENT in IMM-3407-21**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different officer.

2. There is no question to certify.

"Shirzad A."

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3407-21 |
| **STYLE OF CAUSE:** | SAJU VINCENT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | APRIL 25, 2022 |
| **JUDGMENT AND REASONS:** | AHMED J. |
| **DATED:** | JULY 12, 2022 |

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