Federal Court  Cour fédérale

Date: 20230206

Docket: IMM-1335-22

Citation: 2023 FC 172

Ottawa, Ontario, February 6, 2023

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

PHAM THAN LAN LUU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Pham Than Lan Luu, a citizen of Vietnam, seeks judicial review of a decision by the Immigration Appeal Division [IAD] dated January 26, 2022, dismissing her appeal of a removal order issued against her by the Immigration Division [ID] on July 14, 2020, after the ID found Ms. Luu inadmissible on grounds of serious criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. The

IAD was not satisfied that there were sufficient humanitarian and compassionate [H&C] considerations to warrant special relief pursuant to paragraph 67(1)(c) of the Act.

[2] For the reasons that follow, I do not find the IAD's decision to be unreasonable. As a result, this application for judicial review will be dismissed.

II. Facts

[3] Ms. Luu became a permanent resident of Canada on February 8, 2001. She is the mother of three children, currently aged 12, 10 and 9 years old. In April 2014, in relation to charges dating back to 2011, Ms. Luu was convicted of keeping a common bawdy-house under subsection 210(1) of the *Criminal Code*, RSC 1985, c C-46 [Criminal Code], an offence punishable by a term of imprisonment not exceeding two years, and to procuring the involvement of minors under paragraph 212(1)(h) of the Criminal Code, an offence punishable by a term of imprisonment not exceeding 10 years.

[4] On February 19, 2019, a report under subsection 44(1) of the Act was issued, concluding that Ms. Luu was inadmissible on grounds of serious criminality pursuant to paragraph 36(1)(a) of the Act. The matter was referred to the ID following a report under subsection 44(2) of the Act. On July 14, 2020, the ID confirmed that Ms. Luu was inadmissible under paragraph 36(1)(a) of the Act and issued a removal order. Ms. Luu appealed that decision before the IAD, which dismissed her appeal. She now challenges that decision by way of judicial review.

III. Decision under Review

[5] The IAD conducted its analysis in accordance with the non-exhaustive criteria set out in the case law, identified the burden of proof that rested on Ms. Luu as being the balance of probabilities, and stated that in terms of H&C considerations, the test is whether there is evidence that would excite in a reasonable person "a desire to relieve the misfortunes of another" in relation to the situation involving Ms. Luu and her children.

[6] The IAD found that the offences leading to the removal order were serious and, in particular, involved minors who should be protected from prostitution. The IAD found that Ms. Luu expressed no remorse, completely denied her own responsibility, and presented her actions as legitimate by stating that she had simply rented her establishment to masseuses – despite the fact that the police did not find a single massage table in her establishment – and that another person was in charge of the salon at the time that the minors were found to engage in sexual activities. The IAD concluded that despite the relative leniency of her sentence, the offences for which Ms. Luu was convicted involved the sexual exploitation of children; an extremely aggravating factor which was not only criminal but also amoral. Moreover, the IAD noted that Ms. Luu was charged with additional crimes under the *Controlled Drugs and Substances Act*, SC 1996, c 19, that were allegedly committed in 2019. Following a police operation at her home – where aggressive and unleased dogs were found – police officers discovered a significant cannabis operation involving 2,220 plants in the house, where Ms. Luu and her three children were living. The IAD noted that the Direction de la protection de la jeunesse [DPJ] (youth protection services) were brought in to remove the children from Ms. Luu's custody for approximately six months. The IAD stated that although Ms. Luu had not

been convicted of these drug offences and that her case was still pending, it was open to the IAD to assess her credibility in respect thereof (*Canada (Citizenship and Immigration) v Solmaz*, 2020 FCA 126). The IAD noted that during the hearing, Ms. Luu stated again that she had done nothing wrong and provided unconvincing answers to justify her actions.

[7] The IAD also found that the possibility of Ms. Luu's rehabilitation was low. The IAD determined that although Ms. Luu argued that she had admitted to her conduct, she still did not acknowledge her criminal responsibility. The IAD noted that Ms. Luu argued that she had done nothing illegal and that her counsel had resolved the case without her pleading guilty, notwithstanding the fact that she had been convicted. Furthermore, the IAD found that, in terms of the risk of reoffending, Ms. Luu's financial situation remained a serious concern; she had hundreds of thousands of dollars in bank accounts and invested in buildings, but had very little reported income. Given the lack of remorse with respect to her criminal behaviour and considering that after her convictions for prostitution, Ms. Luu clearly turned to cannabis for a period of time rather than looking to enter the legal economy, the IAD was not convinced that Ms. Luu had put herself on the path of integrity and legality.

[8] Moreover, the IAD assessed the evidence adduced by Ms. Luu with respect to her current official employment and found that it was vague and insufficient to properly demonstrate her complete sources of income. The IAD noted that Ms. Luu's net worth was around $1 million. It stated that building up capital is usually a positive factor in an H&C determination, but found that, in this case, the taint of criminality bearing on portions of her income diminished the value to be given to it. The IAD stated that it was very difficult to believe that Ms. Luu worked as

much as she purportedly did, and that even if that was the case, she clearly did not report her income to the tax authorities.

[9] The IAD then engaged in an assessment of the best interests of Ms. Luu's three children. It found that even though the children might not desire to move to another country, little evidence was provided regarding their personal interests, as Ms. Luu spoke a great deal about herself but gave little evidence on the interests of her children. Between the two hearings, the IAD specifically asked the parties to present scenarios for the children in the event Ms. Luu's appeal was to be dismissed, so as to allow the IAD to properly assess how to serve their best interests. Ms. Luu did not comply with this request, and her counsel simply stated that the children would never move to Vietnam in the event of a removal order against her, arguing that they cannot obtain Vietnamese citizenship. The IAD found that Ms. Luu's cooperation in finding solutions for the children in the event of her removal was disorganized, if not deliberately lacking. It considered that a caring and serious parent would have shown the IAD the options available to her family in the event of their removal – in this case, the necessary steps for Ms. Luu's children to immigrate to Vietnam or a plan for them to continue their lives in Canada without their mother.

[10] As a result, the IAD engaged on its own in assessing the possibilities that were most likely, starting with the possibility of the children immigrating to Vietnam. In light of the evidence in the record, it acknowledge that a difficulty arose from the fact that the children would not necessarily automatically obtain status in Vietnam, and it found that Ms. Luu would probably have to take further steps to allow them to live with her legally in Vietnam. The IAD

was of the view that if the children's immigration process were successful, they and Ms. Luu would likely be able to live a more stable and less stressful life in Vietnam as Ms. Luu would be more at ease with the language and living with most of her family from whom she would gain support. The IAD also found that Ms. Luu's wealth would assist with her establishment in Vietnam. The IAD determined that the children were accustomed to changing schools and continued to nevertheless do well academically, as evidenced by school attendance certificates showing frequent moves and Ms. Luu's testimony regarding her children's academic success.

[11] The IAD then assessed the possibility of the children remaining in Canada without Ms. Luu and concluded that the DPJ would have to find them somewhere to live. The IAD found that if the children could not be placed into the custody of other family members or foster families, they would have to be placed in a youth centre. It acknowledged that this would be the least attractive option for them, and only directed as a last resort. The IAD also relied on the fact that when Ms. Luu lost custody of her children in 2019, a foster family had been found for them. Overall, the IAD concluded that even if the best interests of the children weighed in favour of granting Ms. Luu's appeal, they did not outweigh the other factors for determining whether special relief should be granted. The IAD referred to the Federal Court of Appeal's determination in *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, which held that the presence of children in Canada does not call for a certain result. The IAD found that in the present case, Ms. Luu's past behaviour had to be analyzed before it could determine the issue of the best interests of the children as in this case, on several occasions, Ms. Luu acted without regard for the potential impact on her children. During the hearing before me, Ms. Luu's counsel described the family situation as dysfunctional.

[12] Overall, the IAD concluded that the evidence did not weigh in favour of allowing the appeal. It found that the seriousness of the crimes committed by Ms. Luu against underage victims, the low level of remorse, and the insufficient evidence of the legality of her current income demonstrated that there was still a significant risk of reoffending, and that while some establishment had been shown, the last few years of Ms. Luu's life in Canada had been troubled and unstable. The IAD concluded there was no evidence that returning to Vietnam would cause Ms. Luu any particular hardship, except in the event that she were separated from her children if they were to remain in Canada. If that were to be the case, the IAD considered the children's best interests to be insufficient to outweigh the other negative factors militating in favour of Ms. Luu's removal and found that the best interests of the children to have their mother stay in Canada were mitigated by the flawed supervision demonstrated by Ms. Luu.

[13] The IAD concluded that granting a stay of the removal order was not appropriate in the particular circumstances of this case and went on to dismiss the appeal as it was not satisfied, on a balance of probabilities, that there were sufficient H&C considerations to warrant special relief.

IV. Issue and Standard of Review

[14] The sole issue raised in this application for judicial review is whether the IAD's decision was reasonable. The parties agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23 [*Vavilov*]). This Court should intervene only if the decision under review does not bear "the hallmarks of reasonableness — justification, transparency and intelligibility" and if the decision is not

justified “in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

[15] 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” (*Qiu v Canada (Citizenship and Immigration)*, 2022 FC 138 at para 16; *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30). There is no “rigid formula” that determines the outcome (*Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 7). 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 (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 28 [*Kanthasamy*]; *Caleb v Canada (Citizenship and Immigration)*, 2020 FC 1018 at para 10).

V. Analysis

[16] Ms. Luu argues that the appeal of the removal order before the IAD had two aspects to it, the first being the appeal itself and the second being whether, even if the appeal was to be dismissed, the removal order should have been stayed. Following a lengthy and exhaustive decision on the part of the IAD on the issue of the appeal of the removal order during which it set out at length the H&C factors relevant for the consideration of the appeal, including the best interests of the children, the IAD dealt with the issue of a possible stay of the removal order in two short paragraphs, as follows:

> **A stay of the removal order is not appropriate**
>
> [78] Although none of the parties recommend it, the panel will now take the time to explain why granting a stay of removal has

> been ruled out. In order to grant a stay of the removal order, the IAD must first conclude that there are sufficient humanitarian and compassionate considerations. In this case, the appellant does not meet the required threshold, mainly because of the seriousness of the crimes and the low rehabilitation potential.
>
> [79] Whether to grant special relief is determined based on a weighted analysis of the factors. In the panel's view, in this case, the low potential for rehabilitation does not provide the necessary level of trust for a successful stay of execution of the removal order.

[17] Ms. Luu argues that the IAD should have conducted a distinct analysis of the factors relevant to a stay, separate from the lengthy analysis of the H&C factors that it undertook in considering the issue of the appeal. Putting aside the fact that neither party actually requested that the IAD consider the possibility of a stay of the removal order in the event that the appeal were to be dismissed, Ms. Luu argues that, nonetheless, once the IAD independently decided to raise the issue of a possible stay, it should have properly undertaken the corresponding analysis.

[18] Ms. Luu argues that the IAD only considered the following factors in weighing the prospect of a stay of the removal order: the seriousness of the crimes and the low rehabilitation potential. I asked Ms. Luu's counsel, after he conceded that no relevant factors were left out of the fulsome decision on the issue of the appeal, to identify any factors that the IAD did not consider or address, but should have, when it turned its mind to a possible stay of the removal order. I was told that the IAD did not consider the factor of the best interests of the children in the context of a possible stay. Indeed, although Ms. Luu's counsel conceded before me that the IAD was not obligated to cut and paste the entire analysis of the H&C factors – considered in relation to the appeal of the removal order – into the section of the decision relating to the issue of a possible stay, he argued that the IAD should have at least enumerated the factors that it

considered rather than simply highlighting the two factors – the seriousness of the crimes and the low rehabilitation potential – which militated against a stay. Overall, Ms. Luu argues that the decision is unintelligible and thus unreasonable because we do not know what factors were assessed in the determination of whether to grant the stay, in what way those factors were assessed or whether those factors were assessed independently of the success of the appeal.

[19] I am not convinced by Ms. Luu's argument. Although the section of the decision regarding a possible stay is short, putting aside that the IAD undertook such analysis without the issue having been addressed by the parties, it seems clear to me that when the IAD turned its mind to the issue of a possible stay, it had just fully analyzed and weighed the relevant H&C factors as part of its earlier analysis. Ms. Luu, as stated, was unable to identify a single factor that was not taken into consideration in the analysis regarding the appeal but that should have been considered in the context of a stay, or a factor that should have been considered differently in the context of a stay; clearly the best interests of the children, to which a large portion of the IAD's decision was devoted, took over a great part of the IAD's decision, was front and centre in the IAD's mind when it considered the issue of the stay. The specific reference to the seriousness of the crimes – (looking to the past) – and the low rehabilitation potential – (looking to the future) was simply a reference to factors, weighed against other factors, which militated towards not granting the stay. The IAD confirmed that its obligation was to assess the sufficiency of the H&C considerations, and I have not been satisfied that the manner in which the IAD expressed itself shows that it did not accomplish just that. Although the words used could have been clearer, perfection in administrative decisions is not the standard (*Vavilov* at para 91), and I have not been convinced 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).

[20] I am also not convinced that the IAD improperly assessed the best interests of the children. I accept that this is a difficult situation for the children and that the family may, as underscored by Ms. Luu's counsel, be dysfunctional. However, Ms. Luu provided very little evidence and support to the IAD on the issue of the best interests of the children; therefore, even if I were to accept that somehow the IAD missed an element in its analysis, I can hardly fault it for doing so. In any event, Ms. Luu has not identified before me what element was missed in the IAD's overall analysis of the best interests of the children. Without any serious initial submissions relating to this factor, and with Ms. Luu failing to respond to the invitation of the IAD to provide further submissions on the best interests of the children in the event that the appeal were to be dismissed – whether the minor children would follow their mother or remain in Canada under the care of the DPJ – the IAD was left to make do and assess the best interests of the children on its own under the various scenarios based on the limited evidence and common sense. Given the paucity of evidence that the IAD had to work with, I see nothing unreasonable with its findings on the best interests of the children.

[21] It seems clear to me that the IAD took all of the factors identified by Ms. Luu into consideration in assessing the best interests of the children. The IAD followed the steps set out in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166, that is, it established that it was in the best interests of the children to have their mother remain in Canada, assessed the impact on the children in the event of a removal through different scenarios, and weighed that factor against

all of the other factors to come to its decision. In the end, I have not been convinced of any reviewable error on the part of the IAD.

[22] The inconvenient truth for Ms. Luu is that the primary concern of the IAD, which permeated the entire decision, was the failure on her part to show any sign of remorse for her previous actions, coupled with the unconvincing and scant evidence that her current actions have demonstrated a willingness for redemption and a desire for rehabilitation. The factors pointed to by Ms. Luu, that is, her recent legitimate work in a nail salon and a restaurant – even putting aside the questionable evidence thereof – fell far short of convincing the IAD that her particular circumstances would excite in a reasonable person in a civilized society a desire to relieve the misfortunes of another (*Kanthasamy* at paras 13, 28).

[23] For the foregoing reasons, I find that Ms. Luu has not demonstrated that the IAD's decision was unreasonable. Therefore, this application for judicial review will be dismissed.

VI. Conclusion

[24] The application for judicial review is dismissed.

JUDGMENT in IMM-1335-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There are no questions for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1335-22
STYLE OF CAUSE:	PHAM THAN LAN LUU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 19, 2022
JUDGMENT AND REASONS:	PAMEL J.
DATED:	FEBRUARY 6, 2023

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