Federal Court Cour fédérale

Date: 20241115

Docket: IMM-11544-22

Citation: 2024 FC 1822

Ottawa, Ontario, November 15, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

UMME HABIBA URMI
SHAH MOHAMMAD SAGIR
RIDWAN AHMED ARNOB
SADIA AHMED TAYEBA
WASIU AHMED AYAAT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of the decision refusing their application for permanent residence from 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 Applicants claim that the decision is unreasonable because the Officer applied the wrong test and ignored evidence they submitted in assessing hardship, ignored significant evidence about their establishment in Canada, and failed to properly assess the best interests of their children.

[3] For the reasons set out below, this application for judicial review will be granted. The Officer made three reviewable errors in relation to central aspects of the Applicants' H&C claim. Together, they render the decision unreasonable.

[4] First, the Officer failed to address the Applicants' submission about the hardship they would face if they had to leave their youngest child – an American citizen – behind if they were forced to return to Bangladesh. The Applicants made detailed submissions on this issue, and the decision is silent on the point. Second, the Officer accepted that the Principal Applicant ("PA"), Umme Habiba Urmi, and Ridwan, her eldest son had been diagnosed with Post-Traumatic Stress Disorder ("PTSD"), but discounted the Doctors' prognosis regarding the impact of their return to Bangladesh. Finally, the Officer's analysis was overly focused on the Applicants' discredited refugee claim, rather than addressing the risks and hardship they raised in their H&C application.

[5] For the reasons set out below, the application for judicial review will be granted.

I. Preliminary Matter

[6] Before entering into the merits of the case, it is necessary to explain the procedural background. The Applicants are a family originally from Bangladesh: the PA, Shah Mohammad

Sagir is her husband; the couple have three children, Ridwan (16 years old at the time of the H&C); Sadia (10 years old) and Wasiu (7 years old). The PA, her husband and the two older children are citizens of Bangladesh; the youngest child was born in the United States and is an American citizen.

[7] Prior to the hearing, the Applicants' former counsel filed a motion to be removed as solicitor for Shah Mohammad Sagir and their eldest child, Ridwan. The lawyer had been unable to contact Mr. Sagir, and stated that there had been a breakdown in the solicitor-client relationship with Ridwan. Mr. Sagir's departure from Canada was confirmed by affidavit evidence filed by the Respondent.

[8] Prior to the hearing, an Order was issued removing the former counsel as solicitor of record for Mr. Sagir. In addition, the PA and her two youngest children filed a notice of change of solicitor naming Keith MacMillan as their counsel. The older child, Ridwan, was represented by Cheryl Robinson. The Applicants' counsel presented joint submissions on behalf of their clients. Mr. Sagir was not represented and took no part in the hearing.

A. Factual Context

[9] The Applicants landed in Canada in August 2018. Shortly afterwards they made a claim for refugee protection on the basis of their risk from Islamic extremists because the PA had worked for an organization promoting women's rights. The PA alleged that she had been attacked, and that her son Ridwan had been kidnapped. Her husband alleged that he was targeted

for extortion by a local leader of the Awami League and that goons associated with that group attacked him.

[10] The Refugee Protection Division ("RPD") rejected the Applicants' refugee claim, finding significant credibility problems. Their appeal to the Refugee Appeal Division ("RAD") was dismissed, and their application for leave to appeal that decision to this Court was denied.

[11] On November 1, 2021, the Applicants filed their H&C application based on their establishment in Canada, the hardships and risks they would face if they had to return to Bangladesh, and the best interests of their children.

[12] The Officer refused the Applicants' H&C request, after assessing four elements: their establishment in Canada, adverse country conditions, mental health concerns and the best interests of the children. On establishment, the Officer gave some positive weight to the PA's volunteer work at a community organization, but found little evidence that her return to Bangladesh would have a serious negative impact on the group. Noting the positive letters of support from friends, the Officer found the Applicants had made some connections in their community but did not demonstrate that their departure would have a serious negative impact on others in the community.

[13] On adverse country conditions, the Officer focused on the claim that the Applicants have been harassed by Islamic extremists because of the PA's work at an organization promoting women's rights. The Officer gave considerable weight to the negative credibility findings made

by the RPD and RAD, finding that the PA did not address these adverse findings nor provide sufficient corroborative evidence of past mistreatment or abuse. In regard to Applicants' fear of terrorist groups, the Officer noted that the government was taking steps to deal with extremists and there was no indication that state protection would not be available.

[14] As for the evidence that the PA and the eldest son faced mental health challenges, the Officer accepted that they had been diagnosed with PTSD, but noted that the diagnoses were based on observations by medical professionals who relied on the narratives put forward by the claimants rather than independent or clinical testing. The Officer was unable to assign full weight to the medical reports of mental health challenges in light of the negative credibility findings made by the RPD and RAD. The Officer relied on case-law that confirmed that "a psychological report based on a discredited story cannot rehabilitate that story." (*Boyce v Canada (Citizenship and Immigration)*, 2016 FC 922 at para 62).

[15] On best interests of the children, the Applicants had advanced two main claims. First, they noted the challenges in Bangladesh relating to the education and health care systems, as well as the challenges they would face providing for their children because of the overall economic and social situation there. They also relied on the evidence about harassment and discrimination faced by girls and women in Bangladesh. Second, the Applicants pointed out that their youngest child Wasiu was a citizen of the United States, and if they were forced to return to Bangladesh they would face the difficult choice of leaving Wasiu in foster care rather than exposing the child to the difficulties and challenges of life in Bangladesh.

[16] The Officer found that the Applicants had not submitted evidence that their children had any particular medical conditions, and noted the reports on Bangladesh's progress in improving its health system. On the risk of gender-based violence, the Officer relied on the country condition reports showing measures taken by the government of Bangladesh to deal with the problem and found no evidence that police would be unwilling to protect the daughter. While acknowledging that the situation in Bangladesh was not ideal, and that the children would face challenges in making new friends and entering a new school system in Bangladesh, the Officer concluded that the potential negative impact on their best interests did not justify granting H&C relief.

[17] The Officer did not deal with the Applicants' submission about the hardship they would face if they left their youngest child in foster care.

[18] In conclusion, the Officer stated that the PA "[had] presented little new evidence that would overcome the decisions of the RPD and RAD panels. The [PA] has provided little evidence that she and her family are being targeted by [the Islamist extremists]." Based on the review of the factors on which the Applicants' H&C claim was based, the Officer was not satisfied that they had justified an exemption and therefore refused their application.

[19] The Applicants seek judicial review of this decision.

II. Issues and Standard of Review

[20] The Applicants submit that the decision is unreasonable because the Officer applied an exceptionality test in assessing the H&C application, and because the Officer ignored material

evidence in assessing their establishment and the hardship they would face in Bangladesh. They also claim that the Officer failed to properly assess the best interests of their three children.

[21] These issues are to be assessed under the framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and recently confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*].

[22] In summary, under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2). The onus is on the claimants to satisfy the reviewing court that the shortcomings or flaws in the decision are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

III. Analysis

[23] There are three fundamental flaws in the H&C analysis conducted by the Officer. Considered cumulatively, and examining the decision as a whole, I am satisfied that the decision must be set aside because it is unreasonable.

[24] The first major problem with the Officer's decision is the absence of any discussion of the Applicants' assertion that they would have to consider placing their youngest child Wasiu in foster care if they were forced to return to Bangladesh. They set out this concern and its

potential impact on Wasiu and the rest of the family in some detail in their application. Their submissions pointed out that the youngest child was a citizen of the United States, and that rather than bringing the child back to face the deplorable conditions in Bangladesh they would have to consider the very difficult option of leaving the child in foster care.

[25] The Officer did not mention the risk of family separation in the decision. The Respondent argues that this was a purely speculative claim, pointing out that there was no legal impediment to the child returning to Bangladesh with the family. Because of this, the Respondent argues the Officer did not need to address it.

[26] I am not persuaded. The law requires Officers to be "alert, alive and sensitive" to the best interests of a child: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 at para 38 [*Kanthasamy*], citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 74-75 [*Baker*]. Although this factor may not always outweigh other considerations, it is an important element that must be examined with a great deal of attention having regard to the real-world consequences for the child and the rest of the family: *Baker* at para 75; *Kanthasamy* at paras 38-39. The Officer's failure to make any mention of the Applicants' concerns about family separation does not meet this standard.

[27] In some cases, claimants express the possibility that a child may be abandoned if the rest of the family is sent back to their country of origin, but this is only mentioned in passing with no elaboration or basis in the record; sometimes it is raised for the first time on judicial review. In

such instances, the claim has been rejected as purely speculative: see, for example: *Teluwo v Canada (Citizenship and Immigration)*, 2016 FC 1274. In contrast, in the present case the Applicants made substantial and substantive submissions on this point, noting the child's American citizenship and referring to evidence on the negative impacts of family separation and abandonment in the refugee context. This takes the case out of the realm of speculation.

[28] As confirmed in *Mason* at para 76, the *Vavilov* framework demands "responsive justification" from decision-makers (*Vavilov* at para 133). Given the centrality of the question in the Applicants' H&C claim, and in the face of such a substantial record in support of it, the Officer needed to address it. I cannot accept the Respondent's submission that the Officer was not required to deal with this claim because it was speculative. The Officer did not say that in their decision, and it is not for the Court or the Respondent to bolster the reasons actually given.

[29] The second problem with the Officer's analysis is the treatment of the evidence about the PA's and Ridwan's PTSD. The Officer accepted the medical diagnosis that both of them had symptoms that met the diagnostic criteria for PTSD. It is worth noting that the PA had been seen by several different doctors over the space of several years; the diagnosis was not based on a single visit on the eve of the immigration proceeding. However, having accepted the diagnosis of PTSD, the Officer discounted the prognosis provided by the medical professionals.

[30] In relation to the PA, the key findings by the Officer are set out as follows:

> I will accept that the [PA] has PTSD, given the reports submitted by the [PA] from Dr. Pilowsky, Dr. Agarwal and Dr. Shamim. However, I will note that these reports were not based on any independent or clinical testing, but rather on the

> psychologist's/psychiatrist's observations of the [PA] in accordance with their experience and on the [PA's] recounting of the events, the vast majority of which the RPD found not to be credible. [The Officer then cites *Boyce* for the proposition that "a psychological report based on a discredited story cannot rehabilitate that story."]

[31] The Officer made similar findings in regard to Ridwan:

> I will accept that the minor applicant has PTSD, given the report submitted by the [PA] from Dr. Agarwal. However, I am unable to give full weight to Dr. Agarwal's conclusion the minor applicant's PTDS will worsen if he returns to Bangladesh. The fear of worsening symptoms of PTSD is predicated on past events in the [PA's] narrative that was established by the RPD to not have occurred.

[32] The Officer then cited *Suleiman v Canada (Citizenship and Immigration)*, 2017 FC 395 [*Suleiman*] for the proposition that if risk allegations have not been previously established in immigration proceedings, the claimant had to address whether the psychological evidence helps to establish related facts. If the medical evidence did not bolster the claimant's case, then it was necessary to consider what weight to give to the diagnosis. In light of this, the Officer concluded "I am unable to assign full weight to Dr. Agarwal's conclusion that this fear of returning to Bangladesh will not only maintain but exacerbate the minor applicant's symptoms of PTSD."

[33] The problem with the Officer's conclusion is that there is no discussion of the express statements by Dr. Agarwal that a return to Bangladesh will worsen the PA's and her son's symptoms, whether or not they face the risks that they had raised in their refugee claim. This is a crucial difference between this case and the situation discussed in *Suleiman* and similar cases.

[34] In the report about the PA, Dr. Agarwal stated: “It is therefore my opinion that even if the persecutors were to not pursue her and her family actively following their return, Umme will continue to live in constant fear of them and that this will exacerbate her trauma based and depressive symptoms.” In the report about Ridwan, he expresses the point in more detail:

> As I have mentioned in his mother’s report, the subjective feeling of being unsafe is as potent a maintaining factor for an individual’s trauma symptoms as the objective risk of harm. Ridwan associates Bangladesh with his kidnapping when he was only 11 years old, and the terror he felt there because of that. It is my opinion that even though his aggressors don’t target him actively if he and his family are forced to return there, he will still be surrounded by the fear of being targeted. This fear will not only maintain but exacerbate his symptoms of PTSD.

[35] The Officer does not discuss these statements directly, nor do they refer to any other expert evidence that would cast doubt on Dr. Agarwal’s finding. Without some explanation about how and why the Officer discounted these clear statements about the prognosis for the PA and Ridwan if they return to Bangladesh, I am persuaded that this aspect of the Officer’s analysis is unreasonable. It simply failed to grapple with an essential element of the factual matrix that pertains to the H&C application.

[36] Finally, I find that the Officer focused too much on the negative findings made by the RPD and RAD, without engaging with the specific claims advanced by the Applicants regarding the risks and hardships they will face on a return to Bangladesh. The Officer is correct that the RPD and RAD thoroughly rejected the narrative the Applicants put forward in their refugee claim. The Applicants acknowledge the negative credibility findings in their H&C application. They go on, however, to describe many different challenges and difficulties they would encounter on a return to Bangladesh, including inadequate education and medical care, economic

and social strife, and the risk of gender-based violence. None of these were dealt with by the RPD or RAD, and it was incumbent on the Officer to analyze them. Instead, the decision contains several references to the RPD and RAD's negative credibility findings, with no substantive discussion of the risks and hardships the Applicants put forward in their H&C claim. It was not unreasonable for the Officer to consider the RPD and RAD findings as part of the context for assessing the Applicants' H&C request. If their claim rested on the same risks as they had previously put forward in their refugee claim, the RPD and RAD findings would merit greater weight. However, in my view it was unreasonable for the Officer to rely on them to the exclusion of the actual claims and evidence relied on by the Applicants in their H&C request. In doing so, the Officer failed to grapple with the factual matrix, and ran afoul of the *Vavilov* framework.

[37] For all of the reasons set out above, the Officer's negative decision on the Applicants' H&C application is unreasonable. The application for judicial review will be granted. The decision will be quashed and set aside, and remitted back for reconsideration by a different officer.

[38] There is no question of general importance for certification.

JUDGMENT in IMM-11544-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision dated November 3, 2022, refusing the Applicants' H&C application is hereby quashed and set aside.

3. The matter is remitted back for reconsideration by a different officer.

4. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11544-22
STYLE OF CAUSE:	UMME HABIBA URMI SHAH MOHAMMAD SAGIR RIDWAN AHMED ARNOB SADIA AHMED TAYEBA WASIU AHMED AYAAT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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