Federal Court  Cour fédérale

**Date: 20200128**

**Docket: IMM-6376-18**

**Citation: 2020 FC 154**

**Montréal, Quebec, January 28, 2020**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**SHELINA SARKER, SMM OHI AND SAMIA KABIR**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicants, Ms. Shelina Sarker and her two (2) children, Ohi and Samia, are citizens of Bangladesh. They seek judicial review of a decision by a Senior Immigration Officer [Officer] dated November 30, 2018, denying their application for permanent residence based on humanitarian and compassionate [H&C] considerations.

[2] The Applicants entered Canada as visitors in December 2014. They filed a claim for refugee protection on January 13, 2015, alleging a fear of persecution based on the Principal Applicant's sexual orientation. In March 2015, the Refugee Protection Division [RPD] denied their claim for protection, after finding that the Principal Applicant was not credible with respect to a number of issues. In October 2015, the Refugee Appeal Division [RAD] confirmed the RPD's determination and dismissed the Applicants' appeal.

[3] In March 2016, the Principal Applicant submitted an application for permanent residence based on H&C considerations for herself and her children. The application was refused in May 2016. Three (3) months later, the Applicants obtained temporary residence permits and have remained in Canada since.

[4] In July 2017, the Applicants submitted a second application for permanent residence based on H&C considerations. In support of their application, they relied on three (3) factors: (1) the hardship they would encounter if forced to return to Bangladesh; (2) the best interests of the children; and (3) their establishment in Canada.

[5] On November 30, 2018, the Officer refused their H&C application, finding that there was insufficient supporting evidence concerning the Principal Applicant's perceived sexual orientation and the associated risk-related hardships in Bangladesh. The Officer also found that while the Applicants had demonstrated some degree of establishment in Canada, the duration of their stay and their establishment in Canada were not so substantial that they could not return to Bangladesh and re-establish themselves. Finally, the Officer determined that the Principal

Applicant had not demonstrated that the general consequences of relocating and resettling back in Bangladesh would be "counter" to the best interests of the children. The Officer concluded that a positive exemption on H&C considerations was not warranted.

[6] The Applicants now seek judicial review of the Officer's decision. They submit that the Officer: (1) erred in assessing the best interests of the children; (2) erred in assessing the evidence in support of the H&C application; and (3) made veiled credibility findings.

## II. Analysis

[7] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. Therefore, the parties addressed the applicable standard of review under the framework of *Dunsmuir v New Brunswick*, 2008 SCC 9. Since the Applicants had argued that the correctness standard applied to the issue of whether the Officer applied the wrong test for determining the best interests of the children, I issued a direction on December 30, 2019 inviting the parties to make additional submissions on the appropriate standard of review and the application of that standard to the present case.

[8] The parties submit that the applicable standard of review for all of the issues is now reasonableness. I agree. None of the situations identified in *Vavilov* for departing from the presumptive standard of reasonableness apply here (*Vavilov* at paras 10, 16-17).

[9] In conducting a reasonableness review, the focus of the reviewing court must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome (*Vavilov* at para 83). The elements of a reasonable decision were summarized by Justice Rowe in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). […]
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> [34] The analysis that follows is directed first to the internal coherence of the reasons, and then to the justification of the decision in light of the relevant facts and law. However, as *Vavilov* emphasizes, courts need not structure their analysis through these two lenses or in this order (para. 101). As *Vavilov* states, at

> para. 106, the framework is not intended as an invariable "checklist for conducting reasonableness review". […]

[10] Applying this framework to the case at hand, I find that the decision of the Officer fails to exhibit the requisite degree of justification, intelligibility and transparency and is therefore unreasonable.

[11] While the concept of sufficiency of evidence is an issue that will attract much deference on the part of the reviewing court (*Vavilov* at para 125), findings of insufficiency must be explained (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 35). Here, several of the Officer's findings are articulated in terms of "insufficiency of objective evidence" without considering the evidence on the record or offering a rationale for making the finding.

[12] One such example is where the Officer finds that the Applicant has provided "insufficient objective evidence" to support her statement that her siblings have disowned her and sold the property she inherited from her parents, that she was fired by her employer and that she did not know how she would be able to provide for her children.

[13] To support her application for permanent residence, the Principal Applicant produced an affidavit from an individual named Jamal Din Sumon. He states in his affidavit that he is a professor at a college in Bangladesh and a family friend. He claims that he has known the Principal Applicant and her siblings approximately twenty (20) years. Mr. Sumon also states that the Principal Applicant's brother and sister sold the joint property she inherited from her father and that he had spoken to one of the new owners. Notwithstanding this information, the Officer

finds that “insufficient objective evidence” was provided to support the statement that the Principal Applicant’s siblings sold the property. While it was open to the Officer to assess the evidence adduced by the Applicants, there is no coherent and rational analysis in the reasons demonstrating how the Officer came to this conclusion and why Mr. Sumon’s evidence is insufficient or lacks objectivity. Mr. Sumon is not a party to these proceedings, he is not a member of the Principal Applicant’s family and he has also spoken to one of the owners.

[14] I also note the Officer’s finding that Mr. Sumon’s affidavit holds little probative value to support the Principal Applicant’s claim that she has suffered significant losses with respect to her family. Mr. Sumon states in his affidavit that the Principal Applicant’s brother and sisters disowned her after her house was vandalized by people “annoyed” by her sexual orientation. Again, the Officer fails to provide a coherent and rational explanation for discounting this evidence.

[15] I recognize that the reasons must be read holistically and that judicial review is not a treasure hunt for errors. That being said, I find that the Officer’s findings on these two (2) points are sufficiently central to the decision to render it unreasonable. They are part of the foundation upon which the Officer relies to determine: (1) that the Applicants would not suffer undue hardship in re-establishing themselves in Bangladesh; and (2) that it would not be contrary to the children’s best interests for them to return to Bangladesh. Particularly, in assessing the best interests of the children, the Officer relies on the Principal Applicant’s relationship with her family in Bangladesh to find that the children will have the support of their mother and “extended family” (the children’s four (4) aunts) in Bangladesh should they leave Canada. If the

Principal Applicant is estranged from her siblings, as indicated in the affidavits of Mr. Sumon and the Principal Applicant, the Officer's finding that the Principal Applicant's children can rely on the support of the Principal Applicant's extended family cannot be justified on the facts of the record. Moreover, the loss of her home in Bangladesh can significantly impact the Principal Applicant's re-establishment in Bangladesh.

[16] Another example where the Officer relies on the argument of "insufficient objective evidence" concerns the affidavit of Catherine Eleanor Lowther. The Officer gives little probative value to her affidavit because she has provided insufficient objective evidence: (1) "regarding her expertise on determining the veracity of the Applicant's story"; (2) "to establish [her] credentials as an expert in the country conditions in Bangladesh"; and (3) "to support [her] statements regarding her contact with people in Bangladesh".

[17] Ms. Lowther states in her affidavit that she is the wife of the former Canadian Ambassador to Bangladesh. Her husband held this position from 2008 to 2011, and she accompanied him during his posting in Bangladesh. During this time, she taught English to Bangladeshi staff at the Aga Khan Foundation. One of her students was the Principal Applicant's former husband. It was through the husband that she met the Principal Applicant and her children. Based on her experience in Bangladesh, Ms. Lowther states in her affidavit that "it is easy for a girl to be assaulted" in school and that when a young girl is raped, she is blamed for the violence and considered to have brought shame on the family. She adds that she dealt with this issue in one of the most prestigious schools in Dhaka when she worked with some female students setting up an animal welfare club. Through these girls, she found out a number of them

had been subjected to harassment and some had been sexually assaulted. The girls she spoke to refused to report these incidents for fear of the reaction from family, teachers or their friends. She also states that some of the Canadian-funded projects in Bangladesh supported women who had been subjected to acid attacks, forced into slavery or who had lost their family and community support because of the shame brought to them as a result of being raped. Ms. Lowther indicates that she met some survivors and their relatives and that most never bothered to go to the police.

[18] In my view, it was unreasonable for the Officer to discount Ms. Lowther's affidavit on the grounds that she was not an expert in country conditions and that her affidavit was based on personal opinion. Even if her affidavit contained statements of opinion, these statements were nevertheless based on Ms. Lowther's personal experiences while in Bangladesh. In addition, there was objective documentary evidence in the record supporting her statements regarding the treatment encountered by women in Bangladesh.

[19] I also find that the Officer has failed to provide a rationale for finding that there is insufficient objective evidence to support Ms. Lowther's statements regarding her contact with people in Bangladesh. It is not apparent, on the face of the record, how this finding can be reconciled with the Officer's statement accepting that Ms. Lowther "maintains contact with regular people in Bangladesh". I would also mention that the Officer inaccurately quoted Ms. Lowther's statement. She states that she is "still in regular contact with several people in Bangladesh".

[20] A review of the Officer's reasons regarding the best interests of the children also demonstrates that certain findings are not reasonably justified in relation to the evidence on the record.

[21] For instance, in assessing the best interests of the children, the Officer acknowledges that if the children are removed from Canada, returning them to Bangladesh would be detrimental to their education since both the public and private systems are too expensive for the Principal Applicant. However, the Officer finds that "insufficient objective evidence" was provided to establish that the Principal Applicant's daughter would be prohibited from pursuing higher education in Bangladesh if she so desired. In coming to this finding, the Officer repeatedly relies on the fact that the Principal Applicant was able to attend several years of schooling, including several years of post-secondary studies. In reviewing the Officer's reasons, however, there is no indication that the Officer considered that the circumstances of the Principal Applicant's daughter would be different from those of the Principal Applicant when she studied in Bangladesh. The Principal Applicant would be returning to Bangladesh as a single woman with no male protection, her siblings had disowned her and her family property had been sold.

[22] Finally, I also note the Officer's finding that the children have the option of staying in Canada with their father and that the choice ultimately rests with the family. The evidence on the record does not support this finding. While their father has a valid employment authorization to work in Canada until 2020, the children are subject to removal like their mother. In fact, their request for a deferral of removal was refused by an Enforcement Officer, as they were scheduled to be removed from Canada with their mother in August 2016. The decision that the children

remain in Canada does not lie with the family. It belongs to the immigration authorities. To the extent the Officer's assessment of the best interests of the children is based on this erroneous assumption, it is unreasonable. This assessment may have carried significant weight in the Officer's overall assessment of the best interests of the children and in the balance of all H&C considerations. It is not open to me to make that determination or to substitute my own justification for the outcome (*Vavilov* at para 96).

[23] For all of these reasons, I find that the decision is unreasonable and must be set aside.

[24] No questions of general importance were proposed for certification and I agree that none arise.

**JUDGMENT in IMM-6376-18**

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

1. The application for judicial review is allowed;

2. The decision is set aside and the matter is remitted back to a different Immigration Officer for redetermination;

3. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6376-18 |
| **STYLE OF CAUSE:** | SHELINA SARKER ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | JULY 10, 2019 |
| **JUDGMENT AND REASONS:** | ROUSSEL J. |
| **DATED:** | JANUARY 28, 2020 |

**APPEARANCES:**

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| Laila Demirdache | FOR THE APPLICANTS |
| Kelly Keenan | FOR THE RESPONDENT |

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