Federal Court  Cour fédérale

Date: 20210218

Docket: IMM-6352-19

Citation: 2021 FC 160

Toronto, Ontario, February 18, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

NUGMOONISHA HAJI KHIR
MUHAMMAD SAJJAD HAJI KHIR
SALWA HAJI KHIR
NABEEL UMROH HAJI KHIR
FARKHANDAH HAJI KHIR
RAHEEL ALI HAJI KHIR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants seek judicial review of a decision of a Senior Immigration Officer rejecting their request for permanent residence in Canada on humanitarian and compassionate

(H&C) grounds under subs. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). The applicants ask the Court to set aside the decision and remit their application back for redetermination by another officer.

[2] For the reasons below, the application is dismissed.

II. Facts and Events Leading to this Application

[3] The applicant, Nugmoonisha Haji Khir, is a national of South Africa. She was the principal applicant on the H&C application. Her spouse is the applicant, Muhammad Sajjad Haji Khir. He was born in Pakistan, but gave up his Pakistani citizenship when he immigrated to South Africa for their marriage. They have four children: Salwa, Nabeel, Farkhandah and Raheel. All of the children were born in South Africa. Salwa was 17 years old at the time the H&C application was made. The applicants' evidence was that Nabeel, a teenager, was targeted for kidnapping in 2016. Farkhandah was a preteen at the time of the H&C application. She has cerebral palsy and requires assistance in the form of special needs schooling and physiotherapy. Raheel was under 3 years old when the applicants submitted their H&C application.

[4] The adult applicants are successful business owners in Durban, South Africa. They own a restaurant (Al-Khair Eastern Diner), a cell phone kiosk (Shere Punjab Cellular Trading), a produce stall (Umroh Kiosk), and a rental income property. They also own a home in Durban in an area they describe as wealthy.

[5] The applicants arrived in Canada on July 22, 2016 as visitors. They applied for permanent resident status in Canada in March 2017. They departed Canada for South Africa in April 2017, returning to this country in August 2017. While in Canada, they rely on financial support generated by their businesses in South Africa, which have been operated by family members in their absence.

[6] The applicants sought permanent residence in Canada on the basis that they feared violent racial tensions in South Africa, namely violence by the Black Zulu majority against foreign workers and the large Indian / Pakistani business class, i.e. wealthy or perceived-as-wealthy foreign business owners.

[7] In their H&C materials before the officer, the applicants described a perception that Pakistani business owners in Durban have taken jobs and the possibility of success away from majority Black residents. This “hatred” against the merchant immigrant class is said to be exacerbated by the beliefs of the Zulu king, Goodwill Zwelithini, who represents the KwaZulu-Natal province of South Africa where Durban is located. The applicants advised that their phone kiosk has been robbed on numerous occasions. Robbers have also broken into their restaurant. In 2015, a violent riot occurred, starting just two blocks from their restaurant, that “devastated the business community in Durban”. Neither the applicants nor their businesses were victimized during the riot and no riots of a similar scale have occurred since 2015. The applicants also recounted a break-in at their phone kiosk in May 2016.

[8] The applicants also described events that, in their view, suggest that a stranger was targeting Nabeel for a possible kidnapping in February 2016. They submit they intervened before Nabeel was harmed and reported the events to police.

[9] The applicants stated that they never got much assistance from the police in South Africa. Before the officer, the Applicants recounted that Mr Haji Khir founded a civic organization for business owners, known as the Sahara Association, and participated in another, the Pakistani Business Association of Durban. Both organizations were dedicated to uniting businesspersons with common interests to respond to the looting and smash-and-grab robberies in Pakistani-owned shops. The Sahara Association is an association of Pakistani business owners who advocate together for the safety of their commercial businesses. It is also a non-profit food distribution organization through which the applicants feed local people in times of need. The applicants' restaurant cooks free lunches and provides curried mutton and daal for free to as many as a hundred local people each week, as well as lunches to patients at the KwaZulu – Natal Children's Hospital. Mr Haji Khir is also the President of the Overseas Pakistan Citizens Solidarity organization and a member of the Business Watch Programme in Durban.

[10] In their H&C application, the applicants provided a letter from the local Durban police dated November 25, 2016, confirming that Mr Haji Khir had reported several crimes, including burglaries and robberies, to the local police unit. A second letter, from the Pakistan South Africa Association in Durban dated December 3, 2016, described a wide scale of xenophobic attacks against the businesses perceived to be owned by foreign nationals or immigrants in Durban. The

applicants provided a newspaper article describing how Mr Haji Khir intervened in 2007 in a robbery of two women outside their restaurant.

III. The Officer's H&C Decision

[11] The officer considered the applicants' submission that they feared violent racial tensions as members of a foreign business class in Durban. The officer accepted that the applicants' businesses had been targeted several times for burglaries and robberies and that "these events left the family fearful of possible future violence" in their area in Durban. The officer observed that Mr Haji Khir had been in regular contact with local police unit regarding crimes in the area, which indicated to the officer that Mr Haji Khir was an "empowered person who has close connections with the local police department and can seek their help in a time of need".

[12] The officer observed that while in Canada, the family remained financially dependent on income generated by their businesses in South Africa and that no reports had been submitted that those businesses suffered from racially motivated crimes or attacks during that time. The last incident occurred in May 2016.

[13] The officer also found that the applicants did not provide an explanation for why they returned to South Africa from Canada for four months between April and August 2017. The officer observed that the applicants' willingness to return to South Africa "show[ed] a lack of fear of the African ethnic group in the country".

[14] The officer concluded that the applicants were “not personally affected by the adverse country conditions in South Africa”. The officer further concluded that the family can reasonably seek help from the police if they are robbed or their property is destroyed, given Mr Haji Khir’s close connection to the police.

[15] The officer also considered the best interests of the children. The issues were: access to affordable and open post-secondary education; access to affordable and advanced care and support for Farkhandah; Salwa’s impending exposure to a “racist and non-meritocratic” university system that is also “known” for violent protesting; and the “generally safe and unstable environment” in South Africa, which has led to multiple riots, and break-ins and robberies at the applicants’ businesses. The officer addressed each of these issues as they concerned the relevant child.

[16] In support of the H&C application, Salwa submitted a written statement that she feared for her ability to succeed at university in South Africa on account of racist populism against minority groups. She wrote that admissions for non-Black students in South Africa is not meritocratic, that admissions “favour Black applicants,” and that admissions are subject to a quota system that prioritizes Black low-income students. She also feared riots erupting on university campuses. Salwa wishes to attend university in Canada so she can go to medical school. The officer expressed sympathy with Salwa’s fear of violence erupting on university campuses. However, the officer concluded that because her family had “very good financial means,” Salwa would be able to attend university elsewhere as an international student. While not ideal, the circumstances pertaining to Salwa’s post-secondary prospects were not

"exceptional" for the purposes of the H&C application. The officer noted that the parents seemed concerned to provide the best possible education for their children, and rejected their submission that they lacked the means to do so.

[17] The officer also noted the applicants' submissions that Nabeel would be able to access a better university education in Canada. The officer also considered events related to Nabeel's potential kidnapping, finding that "the allegation that [he] was targeted for kidnapping to be speculative".

[18] The officer reviewed the evidence related to Farkhandah's special needs, with reference to whether she would be able to obtain medical treatment and educational opportunities in South Africa. The officer found, through independent research, that there were several private special needs schools in the Durban area that Farkhandah might be able to attend. Despite their claims to the contrary, the officer found that the applicants had sufficient funds from their businesses to send Farkhandah to one of those schools. The officer also noted that Ms Haji Khir stated she benefitted from the emotional support of family members while caring for Farkhandah in South Africa and that the applicants have no family in Canada. Although they had consulted a specialist in cerebral palsy for Farkhandah's care in Canada, no medical report was yet available.

[19] Given Raheel's young age at the time of the application, the Officer observed that his needs were being met by his parents.

[20] Overall, the officer noted that this is a “close knit family” with parents who wish to provide the best for their children. The officer considered it to be in the children’s best interest that they remain in the loving care of their parents, whether inside or outside Canada.

[21] On the evidence of establishment in Canada, the officer found that the family had not been in Canada for an extended period of time – only 1.5 years, not counting their four-month return to South Africa in 2017 – and that the family had weak ties to Canada and strong ties to South Africa, including their businesses that continued to operate there and support them.

[22] Overall, the officer concluded that insufficient H&C grounds existed to justify granting an exemption in relation to the applicants’ application for permanent residence.

IV. Legal Principles

A. *H&C Applications*

[23] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. Those considerations are to include the best interests of a child directly affected. The H&C discretion in subs. 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA*, to mitigate the rigidity of the law in an appropriate case: *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338, at p.350, as quoted in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 14.

[24] Humanitarian and compassionate considerations refer to “those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes ‘warrant the granting of special relief’ from the effect of the provisions of the [*IRPA*]”: *Chirwa*, at p.350 as quoted in *Kanthasamy*, at paras 13 and 21. The purpose of the H&C provision is provide equitable relief in those circumstances: *Kanthasamy*, at paras 21-22, 30-33 and 45. Subsection 25(1) has been interpreted to require that the officer assess whether the applicants would experience “unusual”, “undeserved” or “disproportionate” hardship on leaving Canada. Those words to describe hardship are instructive but not determinative, allowing subs. 25(1) to respond flexibly to the equitable goals of the provision: *Kanthasamy*, at paras 33 and 45.

[25] The discretion in subs. 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, *per* L'Heureux-Dubé, J., at paras 74-75; *Kanthasamy*, at paras 25 and 33.

[26] The onus of establishing that an H&C exemption is warranted lies with the applicants: *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, at para 45. Lack of evidence or a failure to adduce relevant information in support of an H&C application is at the peril of the applicant: *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at paras 5 and 8.

B. ***Standard of Review in this Court***

[27] The parties both submit that the standard of review is reasonableness. I agree. The Supreme Court of Canada affirmed that reasonableness is the presumptive standard upon judicial review and explained that standard in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. Prior to *Vavilov*, it was well established that H&C decisions are reviewed on the reasonableness standard: *Baker*, at paras 57-62; *Kanthasamy*, at para 44.

[28] In conducting a reasonableness review, a court considers the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15. The focus of reasonableness review is on the decision made by the decision maker, including both the reasoning process that led to the decision and the outcome: *Vavilov*, at paras 83 and 86; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6, at para 12.

[29] The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. The reviewing court must read the reasons holistically and contextually, and in conjunction with the record that was before the decision maker: *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, at para 31; *Vavilov*, at paras 91-96, 97 and 103. The reviewing court is not to conduct a "line-by-line treasure hunt" for errors: *Vavilov*, at para 102.

[30] When reviewing for reasonableness, the court asks whether the decision bears the hallmarks of reasonableness (i.e., justification, transparency and intelligibility) and whether the

decision is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov*, at para 99. The reviewing court does not determine how it would have resolved an issue on the evidence, nor does it reassess or reweigh the evidence on the merits: *Vavilov*, at paras 75, 83 and 125-126; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paras 59, 61 and 64; *Kanthasamy*, at para 99; *Owusu*, at para 12. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to the outcome to render the decision unreasonable: *Vavilov*, at para 100.

[31] The onus to demonstrate that the decision is unreasonable is on the applicant: *Vavilov*, at paras 75 and 100.

V. Analysis

[32] The applicants raised two principal issues. First, they submitted that the officer's decision was unreasonable because it disregarded or misapprehended relevant evidence and imposed an unreasonable evidentiary standard in concluding that the applicants would not face hardship on their return to South Africa.

[33] Second, they submitted that the officer failed to adequately assess the best interests of the children by conducting only a superficial assessment that disregarded or misapprehended the evidence.

[34] As will become clear, the applicants' submissions not only addressed whether the officer's decision was unreasonable under *Vavilov* principles, but also strayed into re-arguing the merits of the H&C application and essentially asked the Court to reweigh or reassess the evidence before the officer. The Court is not permitted to do so on this judicial review application.

[35] In oral argument, the applicant's counsel submitted that the key evidence was found in the affidavits of Ms Haji Khir, Mr Haji Khir and their daughter Salwa, in a police report about the alleged attempted kidnapping of their son Nabeel, in documents related to the cost of Farkhandah's treatment and education, and in the country condition documents mentioned in their written submissions. I have read and considered all of these documents.

A. *Did the Officer Ignore or Misapprehend Evidence, or Impose an Unreasonable Evidentiary Standard for Hardship?*

(1) Legal Principles

[36] The applicants first contend that the officer misapprehended or disregarded key evidence, and made findings that were directly contradicted by uncontested evidence. They referred to numerous decisions of this Court to support their position, including *Ogunyinka v. Canada (Citizenship and Immigration)*, 2015 FC 595 (Noel J.); *Zhong v. Canada (Citizenship and Immigration)*, 2017 FC 223 (Boswell J.); *Rathnavel v. Canada (Citizenship and Immigration)*, 2013 FC 564 (O'Keefe J.); *Botros v. Canada (Citizenship and Immigration)*, 2013 FC 1046 (Mason J.); *Prekaj v. Canada (Citizenship and Immigration)*, 2009 FC 1047 (Russell J.); and *SRH v. Canada (Citizenship and Immigration)*, 2012 FC 1271 (O'Keefe J.).

[37] All of these cases either refer to or apply the principles in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 F.C. D-53, [1998] FCJ No 1425 (*per* Evans, J.), or rely on another decision of this Court that does so. I will return to *Cepeda-Gutierrez* below.

[38] The applicants' challenge to factual findings is a relatively common submission in judicial review applications in this Court. It requires the Court to apply established principles governing when it may intervene based on a flaw in the reasoning process used to reach the decision under review, but without reassessing the merits of the decision. In this way, the Court maintains its supervisory role and enables the decision maker to keep its role as the primary fact-finder.

[39] In *Vavilov*, the Supreme Court held that a court on judicial review must ask whether the decision is justified in relation to the facts and law that constrain the decision maker: see paras 85, 99 and 105-106. The focus is on the "reasoning process" used by the decision maker: at paras 83, 84 and 87. At paragraph 101, the Court identified two types of fundamental flaws that make a decision unreasonable, the second of which arises when a decision is in some respect "untenable in light of the relevant factual and legal constraints that bear on it". With respect to constraints, the Court stated, at paragraph 194:

> Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision.

[40] The Supreme Court's reasons specifically addressed a number of constraints, including the evidence before the decision maker (at paras 125-126). The Court held that absent "exceptional circumstances", a reviewing court will not interfere with the decision maker's factual findings and will not reweigh or reassess the evidence (at para 125). At the same time, a reasonable decision is "justified in light of the facts". The decision maker must take the evidentiary record and the general factual matrix that bear on its decision into account and its decision must be reasonable in light of that record and the factual matrix. As the Court held, a decision "may be jeopardized" if the decision maker "fundamentally misapprehended or failed to account for the evidence before it" (at para 126).

[41] The evidentiary record and the factual matrix therefore act as constraints on the reasonableness of a decision: see also *Canada Post Corp. v. Canadian Union of Postal Workers,* 2019 SCC 67 (Rowe J), at para 61; *Canada (Attorney General) v. Honey Fashions Ltd.*, 2020 FCA 64 (de Montigny JA), at para 30.

[42] It is only some elements of the factual and legal contexts that operate as a constraint on the decision maker when exercising delegated powers: *Vavilov*, at para 105. Not every unmentioned fact, or any mistake or misunderstanding of the evidence will warrant intervention by a reviewing court. Peripheral or inconsequential evidence will not normally constrain a decision maker, whereas central or critical evidence may constitute a constraint that urges an outcome or that may have to be addressed in the decision maker's reasons. As mentioned already, *Vavilov* is clear that the reviewing court's ability to intervene arises if the decision is "untenable in light of the relevant factual … constraints" or if the decision maker "fundamentally

misapprehended or failed to account for the evidence before it" [underlining added]. Even then, the Court in *Vavilov* stated that the decision "may be jeopardized" if the decision maker fundamentally misapprehended or failed to account for the evidence before it – it is not mandatory that the reviewing court set aside the decision. See also paragraphs 101 and 194 (noting that the reviewing court may "lose confidence" in the decision).

[43] This approach to the reasonableness of a decision in light of the evidence reflects paragraph 18.1(4)(*d*) of the *Federal Courts Act*, which provides that this Court may grant relief on judicial review if it is satisfied that a federal board, commission or other tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capacious manner or without regard to the material before it". Paragraph 18.1(4)(*d*) contemplates a high degree of deference to fact-finding by administrative decision makers: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 46.

[44] As noted, the applicants have cited numerous pre-*Vavilov* cases in support of their position that the officer in this case ignored or misapprehended the evidence, all of which refer to or ultimately rely on the principles set out in *Cepeda-Gutierrez*. See *Ogunyinka*, at para 30; *Zhong*, at para 23-25; *Rathnavel*, at paras 25-26; *Botros*, at para 23-25; *Prekaj*, at para 29; and *SRH*, at para 46.

[45] As I will outline below, *Vavilov* reflects the essential principles of *Cepeda-Gutierrez* as applied in decisions of the Federal Court of Appeal and this Court. See *Ozdemir v. Canada (Citizenship and Immigration)*, 2001 FCA 331 (Evans, JA), at paras 7 and 9-11; *Hinzman v.*

Canada (Citizenship and Immigration), 2007 FCA 171 (Sexton, JA), at paras 60-61; and *Hinzman v. Canada (Citizenship and Immigration)*, 2010 FCA 177, [2012] 1 FCR 257 (Trudel, JA) at para 38. In *Cepeda-Gutierrez*, Evans J. explained at paragraphs 15-17 that the Court may infer that a decision maker made an erroneous finding of fact "without regard to the evidence" if the decision maker's reasons failed to mention evidence that was relevant to the finding and that pointed to a different conclusion from the one reached by the decision maker. However, Evans J. was clear that such an inference is not to be made due to any omission from the reasons that an applicant may identify, or based on any unmentioned piece of evidence in the record. Justice Evans stated that instead:

> [17] …the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
>
> [*Cepeda-Gutierrez*, at para 17; emphasis added.]

[46] In *Ozdemir*, the Federal Court of Appeal held (at para 9) that decision makers are not bound to explain why they did not accept every item of evidence before them and that "[m]uch depends on the significance of the evidence when it is considered in light of the other material on which the decision was based", citing *Cepeda-Gutierrez.* Justice Evans, by then a member of the appellate court, explained at para 10:

> Nor will a reviewing court infer from the failure of reasons for decision specifically to address a particular item of evidence that the decision-maker must have overlooked it, if the evidence in question is of little probative value of the fact for which it was tendered, or if it relates to facts that are of minor significance to the ultimate decision, given the other material supporting the decision.

Justice Evans concluded in that case that the evidence was not of sufficient importance or probative value that the decision maker's reasons had to deal with it expressly. No inference could be drawn that the decision maker failed to consider all the material in the record: *Ozdemir*, at para 11.

[47] Similarly, in *Hinzman* (2007), at paragraphs 60-61, Sexton JA found that the decision maker's reasons had not considered all of the important evidence and specifically, had not made reference to a "critical" fact that was inconsistent with a finding. That suggested that the decision maker's decision was made without regard to the material before it.

[48] Decisions of this Court have observed that under *Cepeda-Gutierrez* principles, a decision maker's failure to analyze evidence that runs contrary to the tribunal's decision does not necessarily render a decision unreasonable: *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319 (Gleason J.), at paras 38-39; *Herrera Andrade v. Canada (Citizenship and Immigration)*, 2012 FC 1490 (Gleason J.) at para 9; *Canada (Citizenship and Immigration) v. Kornienko*, 2015 FC 85 (Boswell J.), at para 19-20; *Aghaalikhani v. Canada (Citizenship and Immigration)*, 2019 FC 1080 (Gascon J.) at para 24. Rather, a failure to consider evidence *may* lead to the decision being set aside only where the non-mentioned evidence is critical, the evidence contradicts the tribunal's decision and the reviewing court determines by inference that

its omission means the tribunal did not have regard to the material before it: *Rahal*, at para 39; *Herrera Andrade,* at para 9; *Gao v. Canada (Citizenship and Immigration),* 2018 FC 1001 (Diner J.) at paras 12-14 and 18-19; *Aghaalikhani*, at para 24; *Simolia v. Canada (Citizenship and Immigration)*, 2019 FC 1336 (Bell J.), at para 21; *Torrance v. Canada (Attorney General)*, 2020 FC 634 (Gascon J.), at para 58; *Anku v. Canada (Citizenship and Immigration)*, 2021 FC 125 (Pallotta J.), at paras 27-35.

[49] This analysis shows that the Court's assessment when it applies the *Cepeda-Gutierrez* principles is substantially the same as when it applies the standard set out in *Vavilov*, especially at paras 101 and 126. Both focus on the reasoning process used by the decision maker. Both involve a permissive conclusion that the decision may be unreasonable through an assessment of the importance of the erroneous factual finding to the overall decision and the probative value of the ignored or misapprehended evidence to that factual finding. In *Cepeda-Gutierrez* parlance, the decision may be set aside if the non-mentioned evidence is critical, contradicts the decision and the reviewing court infers that the decision maker must have ignored the material before it. In *Vavilov* language, the Court may lose confidence in the decision if the factual finding was untenable in light of the factual constraints in the evidence, or if the decision maker fundamentally misapprehended or failed to account for the evidence in reaching its decision. (I note that the quoted indicia of an unreasonable decision in *Vavilov* may well capture circumstances not covered by the *Cepeda-Gutierrez* cases, for example if there was no evidence at all to support a decision maker's decision or factual finding.)

[50] Given the language in paragraph 18.1(4)(*d*) of the *Federal Courts Act* and the applicable legal principles in the decisions above, it will be rare for the Court to intervene on the basis of allegedly ignored or misapprehended evidence: *Vavilov*, at para 125; *Rahal*, at para 40; *Tsigehana v. Canada (Citizenship and Immigration)*, 2020 FC 426 (Gascon J.), at para 33.

(2) **Application of Legal Principles to this Case**

[51] In my view, the principles just described do not permit the Court to intervene in this case.

[52] The officer found that (1) the applicants had the ability to obtain effective police assistance to address any further incidents of robbery or threats to their personal safety, should they arise; (2) the applicants are affluent and have sufficient funds to provide the necessary support for Farkhandah and post-secondary education for Salwa as an international student; and (3) the adverse country conditions in South Africa did not personally affect the applicants. The applicants challenge each of these findings. I will address them in turn.

[53] With respect to police assistance, the applicants focus on their evidence that in five separate robberies of their businesses, they received no or inadequate assistance from the police. Two of them occurred after Mr Haji Khir formed the Sahara Association to advocate for business owners affected by such incidents. They also submit that the officer failed to make proper findings in relation to a disturbing incident in which a man who was not known to the family attempted to befriend Nabeel, which the applicants strongly believe was an attempted kidnapping. This incident is, in their submission, consistent with the country condition evidence

and the targeting of South Asian business owners who are perceived to have sufficient funds to pay a ransom.

[54] The respondent emphasized that there was considerable evidence before the officer to show that the police provided assistance to the applicants in South Africa, including two police reports taken after alleged criminal acts (including a report about the stranger's interactions with Nabeel). The respondent noted that there was no evidence of any crime against the applicants' interests (themselves or their businesses) reported to the police for the three-year period starting in 2016 leading up to this application. The respondent also noted that the applicants' businesses are still operating and are being run by family members and that the applicants still receive money from those businesses. Further, the respondent emphasized that the applicants returned to South Africa as a family from April to August 2017. During that four-month period, they did not report any criminal incidents to the police.

[55] In my view, the officer's reasoning is not untenable based on the evidence. The officer did not fundamentally misapprehend or ignore the evidence, as argued by the applicants. The essence of the applicants' position is that the police are ineffective and did not do enough to protect them or their businesses. That is certainly a position they can take, but it was not binding on the officer. The officer came to the conclusion that the evidence simply did not demonstrate that the applicants, upon making contact with the police, did not receive adequate police assistance. The applicants' evidence on this point did not operate as a constraint such that it necessarily led to the conclusion advanced by the applicants. In substance, the applicants'

submissions ask the Court to reassess the evidence and come to a conclusion different from the officer, which is something the Court is not permitted to do on this application.

[56] The applicants next challenge the officer's conclusion that the applicants are "affluent" and have sufficient funds for Farkhandah to attend a private special needs school. The applicants acknowledge that they run successful businesses in South Africa and that they earn "dependable income" from their rental property, but submit that the officer's conclusion that they are affluent is not supported by the evidence. They also challenge the officer's independent research into the cost and availability of private schools in South Africa for children with special needs and argue that the officer did not account for or mention many other fees for which the family is responsible in caring for Farkhandah, including speech therapy, physiotherapy and occupational therapy fees. While recognizing counsel's submission to the contrary, the officer found that the applicants did not provide reasons why they could not afford school fees in South Africa and that the applicants had viable options for educating and caring for Farkhandah in that country.

[57] I am not persuaded that the officer's conclusions on this issue are untenable given the factual constraints on the decision or that the officer fundamentally misapprehended the evidence. The evidence overall is that the applicant parents own and run several successful businesses that have consistently generated revenue. Their own evidence is that their restaurant, which opened in 2004, is "very successful" according to Mr Haji Khir, with a capacity of well over a hundred people. According to Ms Haji Khir's evidence, it provides "substantial monthly income which has been maintained since [they] came to Canada". Mr Haji Khir manages the restaurant in addition to his other business responsibilities. Ms Haji Khir is the chef and manager

and is responsible for accounting, payroll and purchases. She also helps Mr Haji Khir rent their income property and manage their cell phone store.

[58] In South Africa, Ms Haji Khir has cared for Farkhandah herself, including providing medication and physiotherapy. Farkhandah has not been in any form of school or had an education. The officer's research suggested two possible private schools for Farkhandah, which the officer considered to be within the family's financial means. The officer noted that one of those schools offered psychological, speech, physio- and occupational therapy, in addition to medical support from nurses. Although the officer did not say so expressly, the officer must have concluded that those services were also within the family's financial means. The applicants did not adduce evidence to quantify those fees to show that they could not afford them. When referring to Farkhandah's care, their evidence confirmed that they are financially stable due to their businesses and did not need government support. I also note that the applicants did not adduce evidence on their H&C application about the relative cost of caring for or educating Farkhandah in South Africa and Canada, nor did they compare the availability, quality or services provided in each place.

[59] On the evidence overall, I am unable to conclude that the officer made a reviewable error in reaching conclusions about the applicants' financial success, and how that success influences their ability to adequately meet Farkhandah's medical and educational needs. While the word "affluent" may be an overstatement, its use in the officer's reasons to describe the applicants' financial circumstances did not render the decision unreasonable.

[60] The applicants' third point concerns whether the officer's decision fundamentally misapprehended or ignored critical evidence when it concluded that the applicants "are not personally affected by the adverse country conditions in South Africa". The applicants contend that they were in fact personally affected by the 2015 riots in Durban and are affected by the adverse country conditions in South Africa generally. They further submit that they adduced extensive objective evidence showing that they fall within a class of persons that is at increased risk of violence in Durban, namely, the "Pakistani merchant class". Specifically, the applicants argue that they were personally affected by the various robberies of their businesses and by the attempted kidnapping of their son Nabeel. They submit that the country condition evidence about xenophobic attacks and lootings against the Pakistani merchant class supported their position that their businesses were targeted for robbery. The applicants contend that the officer was selective in considering the evidence and that the officer's silence on the country condition evidence leads to the inference that the decision was rendered in disregard of that evidence.

[61] The applicants submitted that, in law, the officer imposed an unreasonable and unlawful onus on them to provide evidence that they would be personally targeted in the future, or that they had been personally targeted in the past, when in fact their burden was to provide evidence relating to similarly situated individuals in South Africa.

[62] On the legal burden, I read *Kanthasamy* to confirm that personal risk to the applicant(s) may be demonstrated either through direct evidence or by reasoned inference that they would likely be affected based (for example) on country condition evidence: at paras 52-56, adopting *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714 (Rennie J.), at

para 12. See also *Ylanan v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1063 (Bell J.), at paras 40-41.

[63] In this H&C decision, the officer understood both of the applicants' arguments – that they were personally affected and that they were similarly situated to persons they alleged were adversely affected by the country conditions (i.e. other South Asian merchants living in South Africa). Reading the reasons, I am unable to conclude that the officer did not assess the evidence on both bases. Nor do I believe the officer placed a heightened legal burden on the applicants.

[64] Turning to the submissions about the officer's assessment of the evidence on this issue, I am not persuaded that the officer's decision should be set aside as unreasonable. First, it is important to recognize what the officer stated in the decision. As *Vavilov* counsels, a principled approach to reasonableness review begins with the reasons of the decision maker, to which the reviewing court must pay "respectful attention" (at para 84). The officer stated at the outset that a key issue was the applicants' fear of violent racial tensions in South Africa. The officer specifically recognized the break-ins at the applicants' businesses. The officer addressed the issues raised by the evidence in the paragraphs immediately before the conclusion that the applicants were not personally affected and immediately after that conclusion in respect of the attempted kidnapping of Nabeel.

[65] The officer expressly confirmed having reviewed the applicants' "submissions pertaining to the adverse country conditions in South Africa toward the wealthy or perceived as wealthy foreign business owners". The officer described the 2015 riot in Durban, finding that it

"devastated the business community" in that city. The officer noted that the applicants themselves were not victimized during the riot, although they were in close proximity to it. The officer accepted that the riot left the family fearful of possible future violence in their area in Durban. However, there have not been any further riots of that scale since 2015. The officer found that Mr Haji Khir is an "empowered person" with close connections to police and that their family return trip to South Africa for four months in 2017 showed a lack of fear of the African ethnic group in the country. The officer also specifically addressed the purported attempted kidnapping, concluding that the allegation of the attempted kidnapping of Nabeel was "speculative".

[66] The officer's reasons confirm that the officer was alive to the applicants' submissions and to the evidence both about the country conditions (and specifically the 2015 Durban riot and the various robberies of their businesses) and the specific points in the evidence as advanced by the applicants now on this application. The officer did not reach the conclusion supported by the applicants, but he or she also did not fundamentally misapprehend the evidence. A decision maker must be sensitive to the evidence in the record, but is under no obligation to interpret that evidence in the manner advanced by the applicants.

[67] The officer's role was to assess the evidence on the H&C application as it concerned the hardship that the applicants would suffer on return to South Africa, and whether that hardship was sufficient to justify an exemption under *IRPA* subs. 25(1). I conclude that the officer's decision was reasonable and that specifically, this aspect of the officer's analysis was not so flawed as to constitute a reviewable error.

B. ***Best Interests of the Children***

[68] As the officer recognized, in assessing applications on humanitarian and compassionate grounds, an officer must always be alert, alive and sensitive to the best interests of the children ("BIOC"): *Baker*, at para 75; *Kanthasamy*, at para 38; *Canada (Minister of Citizenship and Immigration) v. Hawthorne*, 2002 FCA 475, at para 10. The children's interests must be given substantial weight, but are not necessarily determinative of an H&C application: *Legault v. Canada (Minister of Citizenship and Immigration)*, at paras 12-13; *Hawthorne*, at para 2.

[69] In this case, the officer considered the interests of each of Salwa, Nabeel, Farkhandah and Raheel. The officer noted (albeit very briefly) Nabeel's loss of Canadian education if he returned to South Africa. The officer considered Salwa's written statement concerning the conditions for admission into, and her fears about attending, university in that country, recognizing her preference to do so in Canada. The officer recognized that Raheel was under 3 years old and his needs were, at present, met by his parents. The officer considered the evidence about Farkhandah's needs relating to her cerebral palsy and the applicants' submissions on that topic, from which the officer quoted at some length. The officer considered Farkhandah's medical condition, noting the absence (at that time) of a report from a Canadian specialist physician whom the family had consulted. The officer researched private special needs schools in Durban and found that the family could afford such a school in South Africa.

[70] The applicants submit that the officer's consideration of the BIOC was superficial and disregarded the evidence. They contend that the officer wrongly concluded that Salwa could

afford to go to university in North America as an international student and that the family could send Farkhandah to a special needs school in South Africa, conclusions they submit were not warranted by the evidence about the family's financial circumstances. The applicants also argue that the officer did not assess whether the children's best interests were with their parents in Canada or with their parents in South Africa.

[71] The respondent argued that the officer considered the relevant evidence and made a reasonable assessment. I agree. The applicants have not demonstrated that the officer ignored any specific evidence that constrained the officer's decision with respect to any of the children, or that the officer fundamentally misapprehended the evidence. The officer did consider the children's interests in both countries, although the reasons do not contain an express statement or summary paragraph on that issue overall. In my view, the applicants' position amounts to a request that the Court reassess the evidence itself, afresh, in particular related to the cost of school fees. As discussed, that is not something the Court is permitted to do on an application for judicial review.

[72] Lastly, both the officer and the respondent emphasized the family's return trip to South Africa for four months in 2017, noting the absence of evidence of any incidents of robbery to their businesses or harm to their persons while back in Durban. At the hearing, the applicants argued that the officer should not have relied on this evidence because it amounted to an argument about re-availment, which they submitted is not an appropriate consideration on an H&C application.

[73] In my view, the officer did not apply re-availment as a legal concept. The officer considered the family's four months in South Africa without incident as a factual matter that was inconsistent with their evidence that they would suffer hardship on returning to that country. Similarly, the respondent submitted in part that their return and the continued operation of their businesses while in Canada were facts inconsistent with their position on hardship. As factual matters, both points are fair game for consideration. It is therefore not necessary to consider the legal issue raised by the applicants as to whether re-availment is a proper consideration on an H&C application.

VI. Conclusion

[74] For these reasons, the officer's H&C decision displays the requisite justification, transparency and intelligibility required by *Vavilov*. The officer did not ignore or misapprehend the evidence and did not assess the best interests of the children in a manner that gives rise to a reviewable error. There is therefore no basis for this Court to intervene.

[75] The application is therefore dismissed. Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-6352-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.
3. There is no order as to costs.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6352-19
STYLE OF CAUSE:	NUGMOONISHA HAJI KHIR, MUHAMMAD SAJJAD HAJI KHIR, SALWA HAJI KHIR, NABEEL UMROH HAJI KHIR, FARKHANDAH HAJI KHIR, RAHEEL ALI HAJI KHIR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 15, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	FEBRUARY 18, 2021

APPEARANCES:

Mitchell Kevin Perlmutter	FOR THE APPLICANTS
David Knapp	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mitchell Kevin Perlmutter Associate Lawyer Desloges Law Group Professional Corporation	FOR THE APPLICANTS
David Knapp Attorney General of Canada	FOR THE RESPONDENT