Federal Court  Cour fédérale

Date: 20210608

Docket: IMM-7496-19

Citation: 2021 FC 571

Ottawa, Ontario, June 8, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

CARINA DEL ROSARIO VELIZ BALCARCEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision of a visa officer [Officer] of Immigration and Citizenship Canada dated November 25, 2019. The Officer denied the Applicant's visa application requesting humanitarian [H&C] exemption from exclusion under the family class [Decision].

II. Facts

[2] The Applicant is a citizen of Guatemala. Her spouse [Spouse] is a Canadian citizen. Her Spouse came to Canada in 2013 as an accompanying dependent on his parents' application for permanent residence. The Spouse has lived in Canada since then and works landscape construction.

[3] In April 2015, the Spouse applied to sponsor the Applicant and their son [Son]. I note the son was born in 2012, before the Spouse came to Canada. Neither the Spouse nor the Son were disclosed on the original application in 2013. This application was denied in July 2016 because the officer found the Applicant and Son were not eligible pursuant to 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. The denial resulted from the undisputed fact they were not declared when his permanent residence application was processed:

Excluded relationships	**Restrictions**
117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	**117(9)** Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member	**d)** sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant

of the sponsor and was not examined.	pas ce dernier et n’a pas fait l’objet d’un contrôle

[4] The Spouse submitted a notice of appeal to the Immigration Appeal Division [IAD] but withdrew it when told the IAD did not have jurisdiction. I note the Applicant says H&C considerations were not asked for in this initial application, but the Respondent submits H&C considerations were requested.

[5] In 2019, the Spouse submitted a new application and requested an H&C exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] from the bar that made his family ineligible to be sponsored under paragraph 117(9)(d) of the *Regulations*.

[6] In his evidence, the Spouse says that when he became a permanent resident he was listed as a dependant of his parents, and his family did not understand they were required to declare both the Applicant and Son. He says he intended to sponsor the Applicant and Son after becoming settled in Canada and after marrying the Applicant. When the Spouse came to Canada, he had just reached the one-year mark of living with the Applicant and did not realize they were in a common-law relationship that needed to be declared. He thought he would have to get married in order to sponsor the Applicant. He was unrepresented at the time and says he did not properly understand the requirement to declare the relationships even if they were not accompanying him to Canada at that time.

[7] In his application, the Spouse acknowledges making a mistake in failing to update/declare the relevant information. He says the omission was unintentional and not meant to

be deceptive or misleading. The application highlighted the significant hardship, stress and grief endured by the family.

[8] The Applicant also notes she suffered while in Guatemala. In 2003, her brother was murdered by criminals. In 2015, her family was extorted and faced death threats. In 2018, another brother was stabbed in the stomach and almost died.

III. Decision under review

[9] In November 2019, the Officer declined to grant the exceptional exemption requested on H&C grounds, and refused the permanent resident visa application. The Office concluded there were insufficient H&C grounds to warrant an exemption to the ban pursuant to paragraph 117(9)(d) of *IRPA.*

IV. Issues

[10] The only issue on judicial review is whether the Decision is reasonable.

V. Standard of Review

[11] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] Justice Rowe said that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness

applies. This presumption can be rebutted in certain situations, none of which applies in this case. Therefore, the Decision is reviewable on a standard of reasonableness.

[12] In *Canada Post*, Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [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).

[13] The Supreme Court of Canada in *Vavilov*, at para 86 states "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision

must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies." The reviewing court must be satisfied the decision maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
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> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[14] Furthermore, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances":

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

VI. Analysis

[15] Section 25 of *IRPA* states a foreign national may apply for permanent residence and request a discretionary exemption from the legislative requirements and the Minister may grant the exemption if they are of the opinion that it is justified by H&C considerations relating to the foreign national, taking into account the best interests of a child directly affected:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

> account the best interests of a child directly affected.

[16] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Supreme Court of Canada says section 25 H&C exemptions are the exception not the rule, and are not intended to be an alternative immigration scheme. As such, there is no right to a particular outcome.

[17] The Applicant submits the Officer failed to reasonably consider the H&C circumstances in this case by failing to articulate or consider what is in the best interests of the child affected, by imposing discrete and high thresholds that fettered the Officer's discretion, and by unreasonably discounting hardship conditions in Guatemala.

[18] In this connection, the Applicant makes a number of submissions alleging unreasonableness; I will deal with what I consider the most relevant for these purposes.

A. *Best interests of the child*

[19] I note the Son is not a party to this application.

[20] The Applicant submits the Officer failed to show they were alert, alive and sensitive to the best interests of the child. The Applicant submits the Officer imposed discrete and high thresholds similar to the "unusual, undeserved and disproportionate hardship" test found to be unreasonable in *Kanthasamy* at para 33, and did not consider granting relief would result in the child living with both parents, receiving physical and emotional support daily and not facing the

hardship that results in being separated from his father. It would also allow the Spouse to continue working with his current employer and financially supporting the family and would reduce the financial burden on the Spouse to support a household in each country.

[21] The Applicant says these factors need to be contrasted with the hardship to the parents and child that result from refusal including ongoing separation and negative consequences that result from unexplained absence of a parent in a child's life. The Applicant says as a single mother she will continue to struggle with the physical and emotional demands and grief that come with being separate from her partner which impact her ability to provide for her Son's best interests.

[22] The Applicant says the Decision below is similar to that found to be unreasonable in *Lu v Canada (Citizenship and Immigration)*, 2016 FC 175 [Russell J], in the same context where the sponsorship was barred under paragraph 117(9)(d) of the *Regulations*. There the Court found the officer was fixated on the sponsor's failure to declare the applicant as a family member to the exclusion of all else, generalized statements on the law that the best interests of a child were considered, and a failure to identify and address the principal H&C factors put forward by the applicant rendered that decision unreasonable. The Court called that analysis, which saw the child indefinitely separated from his Canadian parent, "inhumane in its impact upon a young child, as well as his immediate family", and stated:

> [52] The choices made by his parents have nothing to do with present hardship that the Applicant faces. This Decision is full of reviewable errors under the old law, and would need reconsideration in any event. That law has now changed considerably since the Supreme Court of Canada rendered its

> decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.
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> …
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> [54] In my view, the Officer could only have reached the conclusions he did by ignoring the evidence in this case and being wilfully blind to the facts before him that support this H&C application.

[23] The Respondent submits the Applicant is essentially asking this Court to reweigh the H&C application. With respect, I to agree. It points to *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*] [Nadon JA], an H&C visa exemption to paragraph 117(9)(d) case involving the best interest of the child. There, the Federal Court of Appeal reiterated its decision in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 [Décary JA] that an officer is presumed to know that living in Canada will generally provide children with many opportunities that are not available to them in other countries, and that residing with their parents is generally more desirable than being separated from them. The Federal Court of Appeal noted relevant factors for the visa officer's consideration included: geographical separation of family member; effective links with family members in terms of ongoing relationship as opposed to the simple biological fact of relationship; any previous periods of separation; degree of psychological and emotional support in relation to other family members; options for the family to be reunited in another country; financial dependence and the particular circumstances of the children.

[24] The Applicant submits *Kisana* cannot be given any weight because it was decided before *Kanthasamy* which required the best interests of a child be "well identified and defined" and "examined with a great deal of attention". It submits *Kisana* is also contrary to *Vavilov* which

states at para 98 “where a decision maker’s rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally not meet the requisite standard of justification, transparency and intelligibility.”

[25] However, in my view the Decision in this case was not decided on the basis of an incorrect legal standard but on its facts. In this respect, and on my analysis, the Officer reasonably considered the Son and acknowledged there may be better opportunities for him in Canada. He also considered the Son has lived with the Applicant and his grandparents who are established in Guatemala, and that the Spouse lives with the family 3-5 months every year. In my view, the Officer was alert and sensitive to the best interests of the child.

[26] While the Applicant says the importance of family unity is recognized as a guiding object of *IRPA* and in Canadian law generally, a proposition with which I agree, the best interest of child analysis takes into account the fact that advantages inherent in living in Canada do not by themselves tip the balance in favour of a child who comes within the ambit of our immigration system (*Habtenkial v Canada (Citizenship and Immigration)*, 2014 FCA 180 [Pelletier JA] at paras 46 - 48).

B. *Hardship*

[27] The Applicant submits the Decision is unreasonable because it minimizes and discounts hardships to the child and family. She submits the Decision maker acknowledges that separation is difficult, but unreasonably discounts difficulties in the present arrangement. In this connection the Officer found the Applicant “provided no independence evidence that this [sic] has been

diagnosed with anxiety or depression or that he is unable to seek adequate treatment", and that "many people in the world are separated from family and that is not a unique circumstance". The Officer considered and stated they were "sensitive to the challenges that Guatemala faces, [but] the overall country conditions cannot be considered an exclusive to the PA and accompanying child," in essence, applying the "unusual", undeserved and disproportionate thresholds found to be inappropriate as a sole basis for H&C analysis in *Kanthasamy*.

[28] I considered the impact of *Kanthasamy*, in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72:

> [29] In my respectful opinion, the Supreme Court of Canada in *Kanthasamy* changed the legal tests representatives of the Minister must use to assess H&C applications. Undoubtedly, prior to *Kanthasamy*, hardship was the general test although the courts had acknowledged that it was not the only test.
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> [30] *Kanthasamy* reviewed the history of the Minister's humanitarian and compassionate discretionary power enacted set out in section 25 of *IRPA*. The Supreme Court of Canada re-established that *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 [*Chirwa*] provided an important governing principles for H&C assessments, principles that are to be applied along with the older "hardship" analysis required by the Guidelines:
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> > [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] 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 Immigration Act": p. 350. This definition was inspired by the dictionary definition

> of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.

[31] The Supreme Court of Canada then stated as follows:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.

[32] As to hardship the Supreme Court of Canada said that that the hardship tests continue to apply, but added:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
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> [emphasis in original]

[33] In reviewing the reasons of the Officer, I am unable to detect any appreciation of the *Chirwa* approach. In my respectful opinion, H&C Officers should not only consider the traditional hardship factors, but in addition, they must consider the *Chirwa* approach. I do not say that they must recite *Chirwa* chapter and verse, nor that there are any magic formulae or special words these Officers must use. But the reviewing courts should have some reason to believe

> that the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense.

[29] However, despite the able submission of counsel, I am not persuaded the circumstances in *Marshall* apply in this case.

[30] To the contrary, I agree with the Respondent who argued that the Officer's notes and reasons set out an account of the Applicant's submissions and consideration of all the factors, the family's circumstances and the country condition documents:

A. **Reasons for failing to declare spouse and child**: the Officer recognized the Spouse's explanation that the failure to declare was not intentional, but reasonably found public policy exemptions did not apply because the Spouse would have been ineligible as a dependent child under his parent's application if he disclosed his spouse and child.

B. **Family separation**: the Officer considered that separation from family caused depression and anxiety. However, the Spouse did not provide any independent evidence of diagnosis or treatment. The Officer found the separation of family was by choice of the Spouse who could return to Guatemala. The Respondent also noted the Applicant has not provided any evidence to show the Spouse could not obtain employment or security within Guatemala.

C. **Best interest of the child**: the Officer considered the Applicant's submissions about country conditions based on crime and insecurity. The Officer acknowledged there are better opportunities in Canada but found this was not sufficient to warrant exemption pursuant to section 25 of *IRPA.*

D. **Country condition in Guatemala**: the allegations about threats and the stabbing of a family member were considered also, but were not corroborated. In addition, there is no evidence that the Applicant and Son were directly threatened or harmed and no evidence they continued to live with family members who were being threatened.

[31] I am not persuaded the Officer made a credibility finding concerning country conditions and extortion of family members; instead the Officer in assessing the record concluded the Applicant did not present sufficient evidence of direct threats, sufficient evidence to show the Spouse could not find work in Guatemala, or evidence on country conditions in Guatemala that would make it difficult for him to live there. These findings were open to the Officer.

[32] The Applicant is really asking this Court to reweigh and reassess the factors, circumstances and the evidence in this case. However, as the jurisprudence makes clear, it is not the function of this Court on judicial review to reweigh evidence or substitute its factual conclusions for those of the Officer. As long as the findings have a reasonable basis and are transparent, intelligible and justified given the constraining law and record, this Court may not intervene.

VII. Conclusion

[33] In my respectful opinion, the Applicant has not shown the Decision was unreasonable. The determinations of the Officer were transparent, intelligible and justified based on the facts and law before it. Therefore, in accordance with *Vavilov*, judicial review must be dismissed.

VIII. Certified Question

[34] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-7496-19

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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