Federal Court  Cour fédérale

Date: 20211015

Docket: IMM-4315-20

Citation: 2021 FC 1075

Ottawa, Ontario, October 15, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

BAOZHEN DENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision [the Decision] by an immigration officer [the Officer] to reject her application for permanent residence on humanitarian and compassionate [H&C] grounds, submitted under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] As explained in more detail below, this application is allowed, because the Decision discloses no analysis of the psychological evidence as to the effect that leaving Canada would have upon the Applicant's mental health.

II. **Background**

[3] The Applicant is a Chinese citizen who holds a multiple entry super visa to Canada. She most recently entered Canada in June 2019 and has been residing in Canada with her son, daughter-in-law, and teenaged grandchild in Surrey, British Columbia. In October 2019, the Applicant applied for permanent residence based on H&C grounds.

[4] The Applicant is 83 years old. Her spouse died in 2018, leaving her living alone in a fourth story walk-up apartment in Beijing. Her only son lives in Canada and is a Canadian citizen. She has three siblings who live in Beijing, with whom she is not close.

[5] In support of her H&C application, the Applicant submitted the report of a psychologist, following a psychological assessment performed in August 2019. According to the psychologist, the Applicant reported that, during her time living alone in Beijing, she had trouble sleeping, experienced anxiety and decreased appetite, and feared falling and hurting herself when climbing or descending the stairs at her apartment. She also reported that she has fallen victim to fraudsters/scammers who take advantage of elderly residents in China.

[6] The psychologist's report explained that, since the Applicant has been staying with her son and his family in Canada, she has reported that her sleep and appetite have improved, she has

increased ability to pursue hobbies/activities, she has a healthy social life, and she cherishes being close to her family. She fears that if she must leave Canada she will again experience anxiety, fear and mobility challenges.

[7] The psychologist opined that the Applicant's symptoms, experienced while in China following the death of her husband, would be retroactively classified as either a stand-alone disorder, such as major depressive disorder, and/or a generalized anxiety disorder, although a case could also be made for the diagnosis of adjustment disorder with mixed anxiety and depressed mood. The psychologist also explained that the Applicant was susceptible to the development of a mood disorder or anxiety disorder if she returned to China, where she would be isolated and without family support. The psychologist opined that family separation would lead the Applicant back to a state of isolation, loneliness, dependency without assistance, and deterioration in her mental health functioning.

[8] The Applicant's H&C application also asserted that she and her son have attempted to find her a more suitable apartment but have been unsuccessful, as landlords are hesitant to rent to elderly tenants due to superstition that having a tenant die in the apartment would make it less desirable to future renters.

III. **Decision Under Review**

[9] In the Decision that is the subject of this application for judicial review, the Officer refused the Applicant's application for permanent residence. The Officer noted that the onus is on the Applicant to show which factors should be considered and to provide evidence in

corroboration of those factors. The Officer then analyzed whether the requested relief was justified by H&C considerations, taking into account the best interests of the child [BIOC] affected by the application (the Applicant's granddaughter).

[10] The Officer referred to observations and the conclusion in the psychologist's report submitted by the Applicant. The Officer then noted that the psychologist had seen the Applicant only once, in August 2019, and that the Applicant was not under continuing care, medication, or therapy. The Officer further observed that the Applicant had provided no evidence that she would be unable to access medical or psychological care in China.

[11] On the issue of suitable housing, the Officer found insufficient detail about efforts to find an alternative apartment for the Applicant and that there was little evidence on the record to support the claims that the Applicant was denied rental opportunities by landlords. The Officer concluded that the Applicant had not demonstrated that she is unable to find suitable housing in China or that she is currently unable to reside independently in China.

[12] In relation to the threat to the Applicant by fraudsters/scammers, the Officer found that there was little evidence detailing events in which the Applicant was alleged to have been targeted or showing whether she contacted the police or other authorities to address this issue.

[13] In finding that the Applicant had not demonstrated that adverse conditions in China would have direct negative effects on her that would merit the requested exemption, the Officer noted a number of mitigating factors. Those factors included: the ability of the Applicant's

siblings in China to provide her with support, even if only emotional; the availability of various communication methods by which the Applicant could remain in contact with family in Canada; the availability of other immigration streams under which the Applicant could apply without undue hardship; and the Applicant's multiple entry visa that would permit her to enter Canada as a visitor until its expiry in 2023.

[14] Finally, in addressing BIOC, the Officer noted that the Applicant's only grandchild was 17 years old at the time of her application. The Officer concluded that the evidence on the record did not establish that this child would suffer negative consequences, due to her grandmother's return to China, which would justify an exemption from the regular immigration regime. The Officer concluded that the Applicant's submissions, considered as a whole, did not justify providing relief from the requirement to apply for permanent residence in Canada from abroad.

IV. **Issues and Standard of Review**

[15] The sole issue raised by the Applicant for the Court's consideration is whether the Decision of the Officer to reject her H&C application was reasonable.

[16] Both parties agree, and I concur, that the appropriate standard of review is reasonableness.

V. **Analysis**

[17] The Applicant raises a number of arguments in support of her position that the Decision is unreasonable. My decision to allow this application for judicial review turns on the Applicant's submission that the Officer erred in assessing the psychological evidence. The Applicant relies significantly on *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], in which the Supreme Court of Canada analysed an H&C decision's treatment of psychological evidence as follows (at paras 46 to 48):

> 46 In discussing the effect removal would have on Jeyakannan Kanthasamy's mental health, for example, the Officer said she "[did] not dispute the psychological report" and "accept[ed] the diagnosis". The report concluded that he suffered from post-traumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood resulting from his experiences in Sri Lanka, and that his condition would deteriorate if he was removed from Canada. The Officer nonetheless inexplicably discounted the report:
>
> > . . . the applicant has provided insufficient evidence that he has been or is currently in treatment regarding the aforementioned issues or that he could not obtain treatment if required in his native Sri Lanka or that in doing so it would amount to hardship that is unusual and undeserved or disproportionate.
>
> 47 Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.

> 48 Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations *in addition to* medical inadequacies in the country of origin, may be relevant: *Inland Processing*, s. 5.11. As a result, the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)* (2011), 96 Imm. L.R. (3d) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)* (2012), 14 Imm. L.R. (4th) 66 (F.C.). As previously noted, Jeyakannan Kanthasamy was arrested, detained and beaten by the Sri Lankan police which left psychological scars. Yet despite the clear and uncontradicted evidence of such harm in the psychological report, in applying the "unusual and undeserved or disproportionate hardship" standard to the individual factor of the availability of medical care in Sri Lanka — and finding that seeking such care would not meet that threshold — the Officer discounted Jeyakannan Kanthasamy's health problems in her analysis.

[18] The Applicant submits that the Decision demonstrates the Officer making the same errors as were impugned in *Kanthasamy*: (a) discounting the psychological evidence based on the absence of continuing care, medication or therapy, notwithstanding that the Officer had accepted the psychologist's diagnosis; and (b) focusing on the availability of treatment in China and ignoring the evidence of the effect that returning to China would have upon the Applicant's mental health.

[19] In response to this argument, the Respondent relies heavily on *Esahak-Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461 [*Esahak-Shammas*], in which Justice Strickland considered arguments, similar to those presently being advanced, to the effect that the officer who denied H&C relief in that case failed to analyse reasonably the psychological

evidence as to the effect that return to the principal applicant's country of citizenship would have upon her mental health. The Respondent notes Justice Strickland's comment that concerns arise from the very prevalent practice of applicants providing reports of psychologists and psychiatrists generated on the basis of one brief meeting, often on the eve of an immigration proceeding, and in the absence of any prior documented history of mental health concerns (at para 33).

[20] The Respondent argues that, consistent with those concerns, the Officer noted that the only time the Applicant had sought medical attention for psychological condition was the one examination with the psychologist whose report was presented in support of the H&C application. The Respondent submits that, in that context, it was reasonable for the Officer to note that there was an absence of evidence regarding past or ongoing medical treatment and the ability to access adequate medical treatment in China.

[21] I see nothing unreasonable in this particular portion of the Officer's analysis, which is consistent with the evidence before the Officer and the concerns expressed in *Esahak-Shammas*. However, the conclusion in *Esahak-Shammas,* that the H&C decision under review in that case was reasonable, did not turn on those concerns. Rather, in rejecting the applicants' argument in that case that the officer ignored the evidence of the effect that return to Granada would have upon the principal applicant's mental health, Justice Strickland distinguished *Kanthasamy*, because the psychological evidence before the officer did not include an opinion that the principal applicant's mental health would deteriorate if she returned (at paras 28-30). Justice Strickland concluded as follows (at para 30):

> 30 While the Applicants urge that it is implicit from Dr. Agarwal's opinion that the Applicant's mental health will deteriorate if she is returned to Grenada, I am not convinced that this was implicit. I am also not convinced that it was the role of the Officer, or that it is the role of the Court, to attempt to interpret professional opinions so as to determine their implicit meaning. In my view, in the absence of a clear finding by the psychiatrist that return to Grenada would cause the Principal Applicant's mental health to deteriorate, the Officer did not err in failing to consider the impact on the Principal Applicant's mental health if she were removed from Canada.

[22] The Respondent submits that the evidence in the case at hand is comparable to that in *Esahak-Shammas*, as the psychological report indicated the Applicant was susceptible to developing a mood disorder if return to China, not that she would develop such a disorder. However, as the Applicant argues in reply to this submission, the psychologist's evidence also included the opinion that family separation resulting from the Applicant returning to China would lead her back to a state of isolation, loneliness, dependency without assistance, and deterioration in her mental health functioning (my emphasis).

[23] As such, I agree with the Applicant that, in the case at hand, it is *Esahak-Shammas* rather than *Kanthasamy* that is distinguishable. The Officer analysed the psychological evidence in terms of whether treatment was available in China, but the Decision discloses no consideration of the evidence surrounding the effect that removal to China would have on the Applicant's mental health. In this respect, I find the Decision unreasonable.

[24] In arriving at this conclusion, I have considered the Respondent's argument that, in *Kanthasamy* and other authorities upon which the Applicant relies, the psychologist evidence included more definitive diagnoses than in the case at hand. The Respondent also argues that,

although the Officer accepted the psychologist's opinion that the Applicant is susceptible to mood disorders if returned to China, the Officer then analysed the hardship she would face upon return and concluded that she would not experience conditions that would trigger such a result.

[25] In my view, while these arguments represent reasoning offered by the Respondent as an explanation for the outcome in the Decision, such reasoning is not found in the Decision itself and therefore does not represent a basis to conclude that the Decision is reasonable. As explained in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 96, reasonableness review is concerned with an administrative decision-maker's justification for a decision, not with alternative reasoning that might justify the outcome of the decision.

[26] Having concluded, based on the above analysis, that the Decision is unreasonable, I will allow this application for judicial review and need not consider the Applicant's other arguments. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-4315-20

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the decision under review is set aside, and the matter is returned to another decision-maker for redetermination. No question certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4315-20
STYLE OF CAUSE:	BAOZHEN DENG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEARD BY VIDEOCONFERNECE VIA VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 7, 2021
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 15, 2021

APPEARANCES:

Shane Molyneaux	FOR THE APPLICANT
Erica Louie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shane Molyneaux Law Office Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT